FILED

94 457 SEP - 7 1994

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ILLINOIS STATE BOARD OF ELECTIONS, et al.,
Petitioners,

v.

DENNIS J. HASTERT, et al.,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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Printed by Authority of the State of Illinois (P.O. 36165—85—8-30-94)

QUESTIONS PRESENTED

Where the litigation's actual controversy is between competing plaintiffs, whether a plaintiff who succeeds against opposing plaintiffs is entitled to prevailing party status against a nominal and neutral state defendant for purposes of attorney's fees?

If the plaintiff is eligible for attorney's fees from the neutral and nominal defendant, whether the district court is precluded from denying fees on special circumstances grounds?

LIST OF PARTIES

The Petitioners, in these five consolidated cases on appeal, are the Illinois State Board of Elections (also sued as the Illinois State Board of Election Commissioners), and its members John J. Lanigan, Theresa M. Petrone, Judith A. Jones (replacing Richard A. Cowen), Lawrence E. Johnson, David E. Murray, Langdon D. Neal, Wanda L. Rednour, and Hannelore Huisman.

The Respondents, grouped by separate district court filings, are:

1. Dennis J. Hastert, Harris Fawell, John E. Porter, Phillip M. Crane, Henry J. Hyde, Robert H. Michel and Thomas W. Ewing—No. 91 C 4028;

2. Johnny Scott and Ben Howard—Intervenors in No. 91 C 4028;

3. Wilfredo Nieves, Al Johnson, Linda Coronado, Bobby Rush, Jesus Garcia, Rev. Willie Barrow, Rafael Boria, Miguel Del Valle, Robert L. Lucas, Leon D. Finney, Jr., Rev. Clay Evans, Joseph Gardner, Luis V. Gutierrez, Regner Suarez, Joseph Berrios, Miguel A. Santiago, and Neomi Hernandez—No. 91 C 4154;

4. The Chicago Urban League, Craig R. Collins, Mark Allen, and Nikolas C. Theodore—No. 91 C 5472; and

5. Ann Rosebrook, Daryl Barklow, Amiel Cueto, Richard Mark, Jeanelle Norman, Carolyn Toney, Lee Babcock, Raymond Oliver, Barbara Poshard, William Matthews, Gerald Hawkins, and Eva Savala—No. 91 C 4656.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

The petitioners, Illinois State Board of Elections and its named members, respectfully pray that a writ of certiorari issue to review the decision of the Seventh Circuit Court of Appeals.

OPINIONS BELOW

The Court of Appeals' June 1, 1994 modified opinion on rehearing (App. 1-29) is not yet officially reported. Its earlier December 17, 1993 decision on attorneys' fees (App. 30-53) has been superseded.

The three-judge district court panel issued a published decision on attorneys' fees on January 17, 1992, *sub nom. Hastert v. State Board of Elections*, 794 F. Supp. 254 (N.D. Ill. 1992) (App. 55-66). Separate unpublished orders

on attorneys' fees were entered with respect to one plaintiff group (Rosebrook plaintiffs) on December 27, 1991, January 7, 1992, and January 21, 1992, all of which are reproduced in the Appendix (App. 67-69).

The underlying judgment on congressional redistricting was entered on November 11, 1991, by the district court panel and may be found *sub nom. Hastert v. State Board of Elections*, 777 F. Supp. 634 (N.D. Ill. 1991).

JURISDICTION

The judgment of the Seventh Circuit Court of Appeals was first entered on December 17, 1993, and, upon timely petitions for rehearing, a modified opinion was issued on June 1, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

42 U.S.C. § 1988(b):

> (b) In any action or proceeding to enforce a provision of section 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, the Religious Freedom Restoration Act of 1993, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1973*l*(e):

> (e) In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

Following the 1990 census, these consolidated actions were brought in district court by several plaintiff groups to effectuate the congressional redistricting of Illinois. The three-judge district court panel possessed jurisdiction under 28 U.S.C. § 1331 (general federal question jurisdiction), 28 U.S.C. § 1343 (civil rights and voting rights jurisdiction), and 28 U.S.C. § 2284 (congressional apportionment matters convened before three-judge district court). The defendants, the Illinois State Board of Elections and its members, are seeking review of the propriety of their liability for the attorneys' fees of four plaintiff groups—relief which the district court had denied.

The Congressional Redistricting Action

The results of the 1990 census, issued to the Governor of Illinois in 1991, dictated that Illinois' representation in Congress would be reduced from 22 members to 20 members. At that time, the Illinois State Board of Elections was subject to the terms of a 1981 federal court order, establishing a congressional district plan with 22 districts, including three "super-majority" African-American districts (the 1st, 2nd, and 7th Illinois Congressional Districts). *See Hastert v. State Board of Elections*, 777 F. Supp. 634, 637-38, 646-47 (N.D. Ill. 1991) ("*Hastert I*") (the underlying congressional redistricting decision). Redistricting Illinois would have a potential impact on the tenure of the 22 incumbent Congressmen, due both to the reduction in House membership and to changes in district boundaries. A new map also could affect the relative strength of the Democratic and Republican delegations, and the contours of African-American districts in proximity to the new Hispanic "super-majority" district.

The Illinois General Assembly did not redistrict Illinois under the new census before its adjournment in July of 1991. Beginning June 27, 1991 and over the next few months, five lawsuits were filed in federal district court by interested plaintiff groups, naming the Illinois State Board of Elections and its members as defendants (hereafter "State Board"). Seven individuals and/or organizations also were granted leave to intervene in the actions that were consolidated. *See Hastert I*, 777 F. Supp. at 638-39. Generally, the plaintiffs' actions requested a declaration that the 1981-configured Illinois congressional districts were unconstitutional due to the census results and sought to enjoin the defendant State Board from conducting the 1992 elections under the 1981 court-ordered districting plan.

As detailed below, two plaintiff groups, proposing statewide redistricting plans, represented the interests of the Republican and Democratic Parties and incumbents; the other parties raised more local concerns. There were five plaintiff groups involved in the redistricting litigation who also were before the Court of Appeals on the attorneys' fees issue:

- the "Hastert" plaintiffs are the Republican Party members of Congress, Representatives Hastert, Fawell, Porter, Crane, Hyde, Michel and Ewing (R. Doc. 1 & 61), who proposed the statewide "Republican" map;[1]

[1] Upon consolidation, the majority of filings with the district court were docketed under the *Hastert* file, Case No. 91 C 4028. Record citations to these documents will not include a case number, as above. The citations to any pleading docketed under another file will be preceded by the appropriate case number.

- the "Nieves" plaintiffs are a group of Hispanic and African-American voters (including Chicago aldermen and future Congressmen Luis Gutierrez and Bobby Rush, as well as another Chicago alderman and two state legislators) who submitted a proposed redistricting map for the four minority districts in Chicago (No. 91 C 4154, R. Doc. 1 & 13);
- the "Rosebrook" plaintiffs are a group of voters representing the interests of the Democratic Party members of Congress, who advocated for a statewide "Democratic" map. (No. 91 C 4656, R. Doc. 1 & 7). Democratic Congressmen Durbin, Costello, Bruce, Cox, Poshard, Sangmeister and Evans were billed for the legal services provided to the Rosebrook plaintiffs (R. Doc. 244; Ex. P in Vol. 6 of Loose Pleadings);
- the "Chicago Urban League" plaintiffs also represent the interests of the existing African-American districts and submitted a proposal for the four minority districts (No. 91 C 5472, R. Doc. 1); and
- the "Scott" intervenors are Johnny Scott and Ben Howard, individually and as representatives of the St. Clair County and Madison County, Illinois, National Association for the Advancement of Colored People ("NAACP"), who intervened in the action to oppose an early draft of the Hastert/Republican statewide map (R. Doc. 111 & 115).

See also Hastert I, 777 F. Supp. at 638-39.[2]

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[2] Other parties before the district court (but not the Court of Appeals) were the "Collins" plaintiffs, including Representatives Cardiss Collins and Charles Hayes of the 7th and 1st Congressional Districts, as well as the following intervening parties: Rep. Frank Annunzio (11th District); Rep. Sidney Yates (9th District); Rep. Augustus Savage (2nd District); the Harold Washington Party; and residents of the 3rd Congressional District. *Hastert I*, 777 F. Supp. at 638-39.

On September 19, 1991, the State Board filed a motion to dismiss the action, setting forth the scope of its responsibilities for elections and its lack of authority or duty under federal or state law to draw congressional district boundaries. (R. Doc. 83).[3] The State Board acknowledged that it was bound by the terms of the 1981 redistricting order and represented that it would implement any valid redistricting plan of the legislature or court; however, the State Board "lack[ed] the capacity or legal interest to be an adversary in this cause." (*Id.*).

At a September 20, 1991 hearing, the district court denied dismissal but, without objection from any of the plaintiffs/intervenors, it granted the State Board's alternative request for relief and ordered that the Board's sole participation in the litigation would be to implement the judgment. (R. Doc. 86; *Hastert I*, 777 F. Supp. at 639; *see also* App. 57-58). The State Board played no further role in the proceedings until it responded to post-judgment petitions for attorneys' fees, advanced by several parties. (R. Doc. 238).

During the pre-trial proceedings, the Hastert/Republicans and Rosebrook/Democrats submitted and amended statewide redistricting maps, while proposals for the minority districts were made by the Nieves, Chicago Urban League and other plaintiffs. *See Hastert I*, 777 F. Supp. at 638-39 & 641 n.8. However, by court direction, no party could

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[3] Under the Illinois Constitution, the State Board of Elections was created to have "general supervision over the administration of the registration and election laws throughout the State." Ill. Const. 1970, art. III, § 5. The State Board is a bipartisan board of eight members in which no political party has a majority in membership. *Id.*; 10 ILCS 5/1A-2 (1992).

advance more than one plan, leading to the alignment and adoption of the map proposals. *Id.* at 640 & n.4.

The plaintiffs and intervenors entered into stipulations (i.e., the ideal population of a district and the need for four minority districts), and settled differences among themselves to narrow or remove issues. *Id.* at 640. For example, all parties ultimately agreed to an elongated C-shaped configuration for the Hispanic congressional district. *Id.* at 648 & n.24. Also, the Scott intervenors obtained an accommodation from the Hastert/Republicans whose proposed statewide map divided counties in the East St. Louis area and "illegally and intentionally" diluted the votes of African-Americans. (R. Doc. 112). The Hastert plaintiffs—recognizing that this "intervention was caused by something that we inadvertently did" (R. Doc. 227, Ex. A, Tr. at 37)—quickly stipulated with the Scott intervenors to a change in their proposal. (*See* App. 61-62).

The district court presided over a two-day trial in October 1991. On November 6, 1991, the district court issued its decision (*Hastert I*). (R. Doc. 224 & 225). The court declared the existing map unconstitutional and adopted the Hastert/Republican map, while finding that both the Hastert and Rosebrook proposals would have met constitutional and legal requirements had they been enacted by the state legislature. *Hastert I*, 777 F. Supp. at 641 & n.7, 662. The State Board was ordered to implement the new redistricting map, and the parties were ordered to bear their own costs. *Id.* at 662.

Attorneys' Fees

Various plaintiffs and intervenors moved to modify the judgment to permit attorneys' fees and costs under 42 U.S.C. §§ 1973*l*(e) and 1988. (App. 57). On January 17,

1992, the district court's decision denied "prevailing party" status to the Scott and Chicago Urban League parties, but granted such status to the Hastert plaintiffs (whose map was adopted) and the Nieves plaintiffs (who adopted the Republican map and played a role in the creation of the Hispanic district). (App. 61-63; *Hastert v. State Board of Elections*, 794 F. Supp. 254, 259 (N.D. Ill. 1992) ("*Hastert II*")). However, the court went on to deny the award of fees to these prevailing parties, concluding that the legislative and political lobbying process had been shifted to the federal court from the legislature, where expenses were not compensable. According to the district court, neither the purpose of fee-shifting statutes nor the equities in this case would be served by awarding fees. (App. 63-66).

On December 17, 1993 and on June 1, 1994 upon rehearing, a divided panel of the Court of Appeals affirmed in part and reversed in part the attorneys' fees ruling of the district court. (App. 1-29; App. 30-53). The full panel agreed to affirm the prevailing party status of the Hastert and Nieves plaintiffs and, by reversal, to grant such status to the Scott intervenors. (App. 15-21, 25; App. 42-44, 50). On rehearing, the majority alone reversed the status of the Chicago Urban League and ruled that the League also prevailed. (App. 18-21, 25-27). The Court of Appeals compared the winning and losing plaintiffs in order to identify the prevailing parties. (App. 15).

In both of its opinions, the two-member majority of the Court of Appeals reversed the three-judge district court panel's decision to deny fees on special circumstances grounds. (App. 22-24; App. 46-48). The majority deemed the discretion to deny fees quite narrow, and believed the Illinois taxpayers must pay for the legislature's dereliction. (*Id.*). The dissent would have found no abuse of dis-

cretion by the lower court in denying a fee award, believing that an award would be unfair where 1) the State Board played no active or adversarial role and agreed to enforce the judgment, 2) the litigation involved plaintiff groups vying against one another for partisan interests, and 3) the redistricting process had been shifted from the legislature to the federal courts. (App. 27-29; App. 50-53).[4]

On remand, the State Board thus will be exposed to attorneys' fees claims from the Hastert, Nieves, Scott and Chicago Urban League parties who were last represented by eight law firms or organizations before the Court of Appeals. For reference, the Hastert plaintiffs alone had accrued approximately $450,000 in attorneys' fees through the district court's denial of fees. (Hastert Appellants' Br. at 18 n.13). The other three prevailing parties have not indicated their potential fee requests.

[4] With respect to the Rosebrook plaintiffs, the Court of Appeals first ruled that its jurisdiction was limited to the narrow review of the district court's denial of a motion to reconsider a prior order that precluded the pursuit of fees. (App. 67-69; App. 35-36, 41). On rehearing, the Court found that the Rosebrook plaintiffs' notice of appeal had secured review of the merits of the fee decision (App. 13-14), but it concluded that these plaintiffs were not entitled to prevailing party status since their proposal was not adopted. (App. 21-22).

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT CERTIORARI TO ADDRESS A PLAINTIFF'S ENTITLEMENT TO ATTORNEYS' FEES FROM A NOMINAL AND NEUTRAL STATE DEFENDANT WHEN THE PLAINTIFF HAS PREVAILED ONLY AGAINST COMPETING PLAINTIFFS, IN ORDER TO ENSURE THAT FEDERAL COURTS UNIFORMLY ENFORCE FEE-SHIFTING STATUTES AGAINST DEFENDANTS ONLY IF THEY ARE ACTUALLY FOUND LIABLE FOR VIOLATIONS OF FEDERAL LAW.

Under federal fee-shifting statutes, the factors to be considered in identifying "prevailing party" status in different contexts have been elaborated upon by this Court. *See Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 82 (1989) ("*Garland*") (summarizing case law analysis). While a party's success in the litigation is a general threshold requirement, this Court has recognized that the attorney's fee inquiry must extend beyond a mere claim of victory to an analysis of the nature of the dispute and relief and of the relationship of the winning and losing parties.[5]

This litigation presents the unaddressed question of a nominal defendant's liability for fees when the substan-

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[5] *See, e.g., Kentucky v. Graham*, 473 U.S. 159 (1985) (plaintiff did not prevail against Commonwealth despite successful settlement with employees sued in personal capacities); *Rhodes v. Stewart*, 488 U.S. 1 (1988) (plaintiffs were not prevailing parties with a favorable judgment absent relief that alters defendants' behavior toward plaintiffs); *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412 (1978) (plaintiff's action must be frivolous if defendant is to "prevail" for fee purposes); *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754 (1989) (plaintiffs' success over losing intervenors alone insufficient for fee award).

tive controversy is only between plaintiff groups and "winning" plaintiffs are identified for their relative success against other plaintiffs, rather than against the nominal and neutral defendant. In this category of cases, while some plaintiffs may indeed obtain favorable relief, the rationale for departing from the American Rule on costs by shifting fee liability to one's opponent is absent. Unlike the justification for fee shifting in normal cases, a plaintiff's victory in the present type of case does not represent establishment of the defendant's violation of federal law, and the "losing" opponent is not the defendant. In the context of competing plaintiffs and a neutral defendant, this case asks whether a plaintiff has "prevailing party" status against a nominal defendant when the plaintiff succeeds but the defendant has not "lost".

Fee awards are only permitted when a party has prevailed on the merits. *Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980). From a plaintiff's viewpoint, prevailing party status is obtained by succeeding on "any significant issue in litigation which achieves some of the benefit sought" in bringing suit. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). *See also Garland*, 489 U.S. at 790 (rejecting a requirement to succeed on the "central issue"). In the present case, the Court of Appeals applied only this standard, granting prevailing party status to those plaintiffs whose proposals were adopted, but it acknowledged that the "issue in litigation" was between plaintiffs. (App. 15-21, 42-43). In other words, the court recognized that it was not resolving a plaintiff/defendant dispute.

From a defendant's standpoint, this latter observation is the crucial one. This Court has repeatedly "emphasized the crucial connection between liability for violation of federal law and liability for attorney's fees." *Zipes*, 491 U.S. at 762. Where a defendant has not been prevailed against,

federal fee-shifting statutes do not authorize an award against that defendant. *Farrar v. Hobby*, ____ U.S. ____, 113 S. Ct. 566, 572 (1992); *Kentucky v. Graham*, 473 U.S. at 165. In order to "prevail" against a particular defendant, the plaintiff must be able to point to a resolution of the dispute that materially alters the legal relationship between itself and the defendant. *Farrar*, ____ U.S. at ____, 113 S. Ct. at 572-73; *Garland*, 489 U.S. at 792-93; *see Rhodes v. Stewart*, 488 U.S. 1, 3-4 (1988); *Hewitt v. Helms*, 482 U.S. 755, 761 (1987).

The latter standards, if applied in a case such as this, defeat prevailing party status as against a nominal defendant, despite some plaintiffs' achievement of relief relative to other plaintiffs. Here, the Seventh Circuit made no finding of federal law violation against the defendant, and the litigation resolved only the disputes existing between plaintiffs.

From the inception, the State Board stood willing to implement a new and valid redistricting plan without the necessity of a judgment against it. (R. Doc. 83). *Cf. Farrar*, ____ U.S. at ____, 113 S. Ct. at 574 (judgment for nominal damages modifies defendant's behavior because it forces defendant to pay money he otherwise would not pay). The litigation settled which proposal would be implemented given the "parochial interests and partisan concerns" of the competing plaintiffs (App. 65)—the same competing interests that prevented a legislative resolution.

In enacting fee-shifting statutes, Congress intended that the plaintiff serve as its chosen instrument in vindicating a policy of high priority against the violator of federal law. *See Christiansburg*, 434 U.S. at 418. Policy considerations of fee-shifting statutes are not served in cases such as this, where the plaintiffs litigate their otherwise political disputes.

The imposition of fees in this matter raises theoretical and very practical aspects of fee-shifting statutes, such as: 1) how will the reasonableness of claimed attorney time be determined when one plaintiff "prevails" over other plaintiffs?; 2) would the latters' disinterest in compromise permit the prevailing party to obtain compensation for succeeding over a perhaps unreasonable opponent in order to inexplicably punish the State Board?; 3) how does the State Board identify for itself and the district court any non-compensable hours, when the Board, which lacks the redistricting authority, holds no historical knowledge of the litigation and could not, for example, have extracted a compromise or made an offer of judgment, pursuant to Rule 68 of the Federal Rules of Civil Procedure?; and 4) if plaintiffs may prevail between themselves and yet never be exposed to an opponent's fees, what disincentive to litigation exists when the State Board must pay the fees?

While the State Board recognizes that attorneys' fees have been awarded in redistricting cases, none of those decisions has examined prevailing party status in light of the more limited standards pronounced by this Court since 1985. *See, e.g., In re Illinois Congressional Districts*, 704 F.2d 380 (7th Cir. 1983); *In re Kansas Congressional Districts Reapportionment Cases*, 745 F.2d 610 (10th Cir. 1984). This Court is, therefore, urged to grant a writ of certiorari to examine this aspect of the availability of attorneys' fees awards on the basis of prevailing party status.

II.

THE LOWER COURTS REQUIRE DIRECTION ON THE PARAMETERS OF THE JUDICIALLY-CREATED EXCEPTION TO THE GRANT OF ATTORNEYS' FEES WHEN FOUR OF SIX FEDERAL JURISTS WOULD HAVE DENIED FEES AS UNJUST AND THE TWO-MEMBER MAJORITY DISAGREED.

Even if some plaintiffs had obtained prevailing party status through their litigation, the three-judge district court held discretion to deny an award of fees. When circumstances would render an award unjust, the court may withhold fees from a prevailing party. *Hensley*, 461 U.S. at 429; *Farrar*, ____ U.S. at ____, 113 S. Ct. at 576-77 (O'Conner, J., concurring). *See Zipes*, 491 U.S. at 760 ("[I]n some circumstances, the interests of the losing party *trump* those of the prevailing party.").

Ignoring the abuse of discretion standard requiring affirmance if any rational person could agree with the district court, the two-judge majority plainly refused to recognize the three-judge district court's conclusion, with which the dissent would have concurred. On the same set of facts, six federal jurists have spoken on the application of the special circumstances exception to awarding fees and arrived at opposite conclusions, exemplifying the need for this Court's direction.

For example, the majority was willing to accept as true the district court's conclusion that the plaintiffs' lobbying efforts had been shifted from the legislative to the federal judicial forum. (App. 23). Nevertheless, it obliterated the special circumstances exception by finding that a state agency *may* be liable for the prevailing parties' fees. (*Id.*, citing *Hutto v. Finney*, 437 U.S. 678, 694 (1978)). The majority failed to recognize that the exception must exist despite plaintiffs' prevailing status and the defen-

dant's lack of immunity under *Hutto*, or it would have no meaning.

While the State Board contends that the true nature of the plaintiffs' litigation should have prevented prevailing party status as against the nominal defendant, the district court and the dissenting appellate judge viewed the particular characteristics of this type of litigation as justification for withholding a fee award. Addressing the parameters of the special circumstances exception would avoid the confusion over its application and curtail unnecessary fee litigation.

CONCLUSION

For these reasons, the Illinois State Board of Elections and the Board members respectfully ask this Court to issue a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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Printed by Authority of the State of Illinois (P.O. 36165—85—8-30-94)

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APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

App. 1

[Dated June 1, 1994]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 92-1397, 92-1398, 92-1399, 92-1402 and 92-1403

DENNIS J. HASTERT, HARRIS FAWELL, JOHN E. PORTER, PHILIP M. CRANE, HENRY J. HYDE, ROBERT H. MICHEL, and THOMAS W. EWING,

Plaintiffs-Appellants,

and

JOHNNY SCOTT and BEN HOWARD,

Plaintiffs-Intervenors-Appellants,

v.

ILLINOIS STATE BOARD OF ELECTION COMMISSIONERS, JOHN J. LANIGAN, THERESA M. PETRONE, RICHARD A. COWEN, HANNELORE HUISMAN, LAWRENCE E. JOHNSON, DAVID E. MURRAY, LANGDON D. NEAL and WANDA T. REDNOUR,

Defendants-Appellees.

DENNIS J. HASTERT, HARRIS FAWELL, JOHN E. PORTER, PHILIP M. CRANE, HENRY J. HYDE, ROBERT H. MICHEL, and THOMAS W. EWING,

Plaintiffs-Appellants,

v.

(Caption continued on following page)

STATE BOARD OF ELECTIONS, JOHN J. LANIGAN, THERESA M. PETRONE, RICHARD A. COWEN, LAWRENCE E. JOHNSON, DAVID E. MURRAY, LANGDON D. NEAL, WANDA T. REDNOUR and HANNELORE HUISMAN,

Defendants-Appellees.

WILFREDO NIEVES, AL JOHNSON, LINDA CORONADO, BOBBY RUSH, JESUS GARCIA, REV. WILLIE BARROW, RAFAEL BORIA, MIGUEL DEL VALLE, ROBERT L. LUCAS, LEON D. FINNEY, JR., REV. CLAY EVANS, JOSEPH GARDNER, LUIS V. GUTIERREZ, REGNER SUAREZ, JOSEPH BERRIOS, MIGUEL A. SANTIAGO, and NEOMI HERNANDEZ,

Plaintiffs-Appellants,

v.

ILLINOIS STATE BOARD OF ELECTION COMMISSIONERS, JOHN J. LANIGAN, THERESA M. PETRONE, RICHARD A. COWEN, HANNELORE HUISMAN, LAWRENCE E. JOHNSON, DAVID E. MURRAY, LANGDON D. NEAL and WANDA T. REDNOUR,

Defendants-Appellees.

THE CHICAGO URBAN LEAGUE, CRAIG R. COLLINS, MARK ALLEN, and NIKOLAS C. THEODORE,

Plaintiffs-Appellants,

v.

(Caption continued on following page)

STATE BOARD OF ELECTIONS, JOHN J. LANIGAN, THERESA M. PETRONE, RICHARD A. COWEN, LAWRENCE E. JOHNSON, DAVID E. MURRAY, LANGDON D. NEAL and WANDA T. REDNOUR,

Defendants-Appellees.

ANN ROSEBROOK, DARYL BARKLOW, AMIEL CUETO, RICHARD MARK, JEANELLE NORMAN, CAROLYN TONEY, LEE BABCOCK, RAYMOND OLIVER, BARBARA POSHARD, WILLIAM MATTHEWS, GERALD HAWKINS, and EVA SAVALA,

Plaintiffs-Appellants,

v.

STATE BOARD OF ELECTIONS, JOHN J. LANIGAN, THERESA M. PETRONE, RICHARD A. COWEN, HANNELORE HUISMAN, LAWRENCE E. JOHNSON, DAVID E. MURRAY, LANGDON D. NEAL and WANDA T. REDNOUR,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
Nos. 91-C-4028, 91-C-4154, 91-C-4643, 91-C-4656 and 91-C-5472
Michael S. Kanne, *Circuit Judge*, **Charles R. Norgle, Sr.** and **Suzanne B. Conlon**, *District Judges.*

ARGUED JANUARY 7, 1993—DECIDED DECEMBER 17, 1993
REHEARING GRANTED and OPINION AMENDED JUNE 1, 1994*

Before CUDAHY, COFFEY and ROVNER, *Circuit Judges.*

CUDAHY, *Circuit Judge.* We are asked here to review a decision of a three-judge district court denying attorneys' fees to certain parties involved in litigation regarding congressional redistricting in Illinois following the 1990 census. We initially decided that we had jurisdiction over the appeals brought by the Hastert, Nieves, Urban League and Scott plaintiffs, but jurisdiction over the Rosebrook appeal only to the extent that they appealed the district court's denial of their Rule 60(b) motion to reconsider its judgment. *Hastert v. State Board of Election*, Nos. 92-1397, 92-1398, 92-1399, 92-1402 & 92-1403 slip op. at 11-12 (7th Cir. Dec. 17, 1993). We then affirmed the district court's determination that the Hastert and Nieves plaintiffs were prevailing parties, *id.* at 14, and that the Urban League plaintiffs were not, *id.* at 15-17. But we reversed the district court's determination that the Scott plaintiffs were not prevailing parties. *Id.* at 14-15. Finally, we reversed the decision that there existed "special circum-

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* On consideration of the petition for rehearing with suggestion for rehearing en banc filed by the defendants-appellees, a vote of the active members of the court was requested, and a majority of the judges in active service have voted to deny rehearing en banc. Chief Judge Posner, Judge Coffey and Judge Manion voted to grant rehearing en banc. Judge Flaum and Judge Kanne did not participate in the consideration of the suggestion for rehearing en banc.

On consideration of the petitions for rehearing with suggestion for rehearing en banc filed by the plaintiffs-appellants, the panel has voted to grant in part the petitions for rehearing, and herein issues its amended opinion. No judge in active service has requested a vote on the suggestion for rehearing en banc. Judge Flaum and Judge Kanne did not participate in the consideration of the suggestion for rehearing en banc.

stances" precluding an awarding of fees to the prevailing parties. *Id.* at 17-19. The Rosebrook plaintiffs, the State Board of Election and the Urban League have since filed petitions for rehearing. We today grant in part the petition filed by the Rosebrook plaintiffs and grant the petition of the Urban League plaintiffs. As a consequence, we issue this amended opinion.

I.

We are presented initially with some rather puzzling jurisdictional questions. To resolve them, we must recount the procedural history of this litigation in regrettably copious detail.

Because Illinois' population grew during the 1980s at a rate slower than that of the United States as a whole, the number of congressional seats apportioned to Illinois was reduced from 22 to 20. The task thus fell to the Illinois legislature to implement a constitutionally acceptable congressional redistricting plan, taking into account the fewer districts allocated to the state.[1] This is not an easy task under any circumstances, but it may be virtually impossible when the governor is of a different political party than a majority of the members of both houses of the legislature.[2] Such was the situation in Illinois in 1991. And, quite predictably, the Illinois General Assembly failed to enact a redistricting plan by the constitutionally mandated June 30, 1991 deadline. Indeed, the legislature failed even to bring a redistricting plan to the floor for debate.

Anticipating this legislative deadlock, the Republican Party members of the Illinois congressional delegation (the "Hastert" plaintiffs or group) filed the initial action in this

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[1] Article 4, § 3(b) of the Illinois Constitution states, "In the year following each Federal decennial census year, the General Assembly by law shall redistrict the Legislative and Representative Districts."

[2] Redistricting plans are within the veto power of an Illinois governor. *See Williams v. Kerner*, 30 Ill.2d 11, 195 N.E.2d 680 (1964).

matter on June 27, 1991. The Hastert plaintiffs sought a declaration that the present Illinois congressional districts were unconstitutional because of changes reflected in the 1990 census. They also sought to enjoin the Illinois State Board of Elections from conducting the 1992 congressional elections under the congressional district plan then in effect, and submitted their own redistricting proposal to replace the outdated map. The Chief Judge of this court convened a three-judge district court to hear the case, as 28 U.S.C. § 2284(a) requires.

On July 3, 1991, a group of Hispanic and African-American voters (the "Nieves" plaintiffs or group) filed a similar action. Actually, the "Nieves" plaintiffs frequently participated as two separate sub-groups—an Hispanic sub-group and an African-American sub-group. These sub-groups were often represented by different lawyers. In addition to the relief requested by the Hastert group, the Nieves plaintiffs (both sub-groups) sought the creation of a congressional district containing a majority of Hispanic voters which, they maintained, section two of the Voting Rights Act, 42 U.S.C. § 1973, required. The Nieves and Hastert actions were later consolidated.

On July 24, 1991, a group of voters ostensibly acting on behalf of certain members of the Illinois congressional delegation affiliated with the Democratic Party (the "Rosebrook" plaintiffs or group) filed still another similar action, which was subsequently consolidated with the Hastert and Nieves cases. On the same day, U.S. Representative Cardiss Collins and U.S. Representative Charles Hayes, along with several voters from their respective African-American majority districts (the "Collins" plaintiffs or group), filed a fourth action that was also consolidated with the Hastert and Nieves cases. Finally, the Chicago Urban League, representing the interests of voters in the existing African-American majority congressional districts (the "Chicago

Urban League" plaintiffs or group), filed its own suit on August 29, 1991. This too was consolidated with the others.[3]

The district court issued its decision on the merits on November 6, 1991, enjoining the Board from using the existing congressional district plan and ordering it to put into effect the plan proposed by the Hastert plaintiffs. *Hastert v. State Board of Elections*, 777 F. Supp. 634 (N.D. Ill. 1991). In the final sentence of its opinion, the district court ordered that "all parties to these consolidated cases bear their own costs." 777 F. Supp. at 662. On November 14, 1991, the Hastert, Nieves, Chicago Urban League and Scott groups moved the district court to alter or amend its judgment to award them costs as prevailing parties. They also filed a petition for an award of their respective attorneys' fees pursuant to 42 U.S.C. §§ 1973*l*(e) and 1988. On November 21, 1991, the Collins plaintiffs moved the court for leave to file a petition for attorneys' fees. Also on November 21, the Rosebrook plaintiffs filed a Rule 59(e) motion to alter or amend the judgment.[4] While this motion was still pending, the Rosebrook plaintiffs filed, on December 24, 1991, a motion for leave to file a petition for attorneys' fees and expenses.

The district court denied the Rosebrook plaintiffs' Rule 59(e) motion on December 27, 1991, and on January 7, 1992, the court denied as untimely their motion for leave to file a petition for fees. On January 13 the Rosebrook

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[3] Several individuals and organizations were permitted to intervene in the consolidated action, including Johnny Scott and Ben Howard (the "Scott" plaintiffs or group), acting individually and as representatives of local chapters of the National Association for the Advancement of Colored People.

[4] The Rosebrook plaintiffs asked the court to amend its judgment to state that the Hispanic majority district proposed by the Hastert plaintiffs, and later adopted by the court, was substantially similar to the Hispanic majority district proposed by the Rosebrook plaintiffs. The apparent purpose of this motion was to buttress the Rosebrook plaintiffs' claim that they were prevailing parties and thus entitled to attorneys' fees.

group moved the court to reconsider its denial of their fee motion. On January 17, 1992, the district court issued a memorandum opinion denying the Hastert, Nieves, Collins, Chicago Urban League and Scott groups' motions for costs and attorneys' fees. *Hastert v. State Board of Elections*, 794 F. Supp. 255 (N.D. Ill. 1992). In the same opinion, the court ordered that the cost of publishing notices of the action in newspapers throughout the state be divided equally among the Hastert, Nieves, Rosebrook and Collins groups. 794 F. Supp. at 261. Four days later, on January 21, the court denied as moot the Rosebrook plaintiffs' January 13 motion for reconsideration.

On January 28, the Nieves plaintiffs moved the district court to reconsider its January 17 decision denying attorneys' fees. The Hastert plaintiffs filed an identical motion on January 29. On January 31, the Collins plaintiffs moved the court to reconsider its denial of attorneys' fees and its allocation of the costs of publishing notice. The district court has never ruled on these motions. Several plaintiff groups next sought to vest jurisdiction in this court. The Scott plaintiffs on February 13, the Hastert and Nieves plaintiffs on February 14, and the Chicago Urban League group on February 18, filed notices of appeal with respect to the district court's January 17 decision denying attorneys' fees. Also on February 18, the Rosebrook plaintiffs filed a notice of appeal with respect to the district court's November 6, 1991 judgment; the December 27 order denying their motion to alter or amend that judgment; the January 7, 1992 order denying their motion for leave to file a petition for fees; the January 17 opinion and the January 21 order denying their motion to reconsider. The Collins plaintiffs had not filed a notice of appeal by the time these cases were set for argument on appeal.[5]

[5] On February 27, 1992, the Collins plaintiffs moved the district court to rule on its motion for reconsideration of the denial of fees. The court has yet to dispose of this motion.

We have jurisdiction here, if at all, pursuant to 28 U.S.C. § 1291, which vests in the courts of appeals jurisdiction over "all final decisions of the district courts of the United States." As an initial matter, we note that we do not have jurisdiction over the merits of this case because such appeals must be made directly to the United States Supreme Court. *See* 28 U.S.C. § 1253 ("[A]ny party may appeal to the Supreme Court from an order [pertaining to an] injunction in any . . . action . . . required . . . to be heard and determined by a district court of three judges") and 28 U.S.C. § 1291 (courts of appeals have jurisdiction of appeals from final decisions of the district courts "except where direct review may be had in the Supreme Court").[6] Appeal from the district court's denial of attorneys' fees, however, is properly made to this court. *See Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 737 n.16 (1980) (Supreme Court does not have jurisdiction under § 1253 if only attorneys' fees questions are appealed). It thus follows that awards of attorneys' fees are appealable independent of the merits and constitute separate judgments for purposes of § 1291. *People Who Care v. Rockford Board of Education District No. 205*, 921 F.2d 132, 134, 135 (7th Cir. 1991). But such fee awards, or in this case denials, must be final in order to trigger our § 1291 jurisdiction.

The district court's November 6 opinion was unquestionably a final decision on the merits. But there is a considerable question whether it said anything, final or otherwise, about attorneys' fees. The only pronouncement of the district court in its November 6 opinion that might be construed to reach the attorneys' fees issue is its final sentence: "[P]arties to these consolidated cases shall bear their own *costs*." 777 F. Supp. at 662. Sections 1973*l*(e) and 1988 provide that "prevailing parties" in actions to

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[6] Accordingly, the Rosebrook plaintiffs' notice of appeal is ineffective to the extent it seeks review of the merits of the district court's redistricting decision.

enforce constitutional voting guarantees and certain provisions of the civil rights laws are entitled to "a reasonable attorney's fee as part of the *costs*." Thus, there is no logical impediment to concluding that the district court's November 6 decision resolved, albeit *sub silentio*, the parties' entitlement to attorneys' fees. However, we are not entirely convinced that this is a correct view, and we are quite certain that the language of the district court, if intended to deal with attorneys' *fees* (in addition to routine court *costs*), was ill-chosen. Indeed, it would not be irrational to conclude that the district court's order had nothing to do with attorneys' fees.

Federal Rule of Civil Procedure 54(d) provides that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." The Supreme Court has instructed that 28 U.S.C. § 1920 defines the term "costs" as it is used in Rule 54(d). *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 441 (1987). Section 1920 authorizes the taxation of certain rather routine litigation expenses, including clerk, marshal and court reporter fees, "as costs." Although Rule 54(d) creates a presumption that the prevailing party will recover these costs, the decision to make the award of costs is entrusted to the sound discretion of the district court. *Soler v. Waite*, 989 F.2d 251, 254-55 (7th Cir. 1993). As a result, district courts routinely direct that prevailing parties are not entitled to Rule 54(d) costs through concise orders, frequently no longer than a single sentence. *See, e.g., Tolle v. Carroll Touch, Inc.*, 813 F. Supp. 1368 (C.D. Ill. 1993); *Harlan E. Moore Charitable Trust v. United States*, 812 F. Supp. 130 (C.D. Ill. 1993); *Nalco Chemical Co. v. Hydro Technologies, Inc.*, 809 F. Supp. 672 (E.D. Wis. 1992); *Ridgefield Park Transportation v. Uhl*, 803 F. Supp. 1467 (S.D. Ill. 1992). The district court's November 6 "tag line" that the parties to this litigation were to "bear their own costs" is arguably an adequate exercise of its discretion to deny Rule 54(d)

costs, as that term is defined by 28 U.S.C. § 1920.[7] But attorneys' fees would seem to be "costs" of a different sort.

Before the Supreme Court decided *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), many federal courts believed that they had the power in certain cases, contrary to the so-called "American" rule that parties are to bear their own costs of legal representation, to award attorneys' fees to prevailing parties as a component of Rule 54(d) costs. In *Alyeska*, however, the Court disapproved this practice and held that federal courts may order the losing party to pay the winner's attorneys' fees only if Congress has authorized such fee awards by statute. *Id.* at 263-64. There is no dispute that sections 1973*l*(e) and 1988 are statutes of this type nor, as a result, is there any question that the district court had the power to decide which parties to the present litigation, if any, were entitled to attorneys' fees. There is legitimate room for doubt, however, that the district court exercised this power on November 6.

It is true that even after *Alyeska* we continued to treat requests for attorneys' fees under section 1988 as motions for costs governed by Rule 54(d). *See Hairline Creations, Inc. v. Kefalas*, 664 F.2d 652, 659 (7th Cir. 1981) and *Bond v. Stanton*, 630 F.2d 1231, 1234 (7th Cir. 1980), *cert. denied sub nom. Blinzinger v. Bond*, 454 U.S. 1063 (1981). But this is the only similarity section 1988 attorneys' fees have to Rule 54(d) costs. While district courts have broad discretion to award or deny Rule 54(d) costs, their "discretion to deny a fee award [under section 1988] to a prevailing party is narrow." *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 68 (1980). Indeed, we have held that prevailing civil rights plaintiffs are entitled to their attorneys' fees "as a matter of course." *Entertainment Con-*

[7] Hereafter, when we use the phrases "Rule 54(d) costs" or "routine Rule 54(d) costs" we will be referring to the set of costs described by 28 U.S.C. § 1920.

cepts, Inc. III v. Maciejewski, 631 F.2d 497, 506 (7th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981). *See also Dawson v. Pastrick*, 600 F.2d 70, 79 (7th Cir. 1979). Although a district court may be able to dispose of routine Rule 54(d) costs with a single, off-hand line at the end of a lengthy decision on the merits, a denial of section 1988 attorneys' fees would seem to require more deliberation and an explicit disposition.

Admittedly, we cannot know with any degree of certainty whether the district court here considered the attorneys' fee issue before issuing its November 6 opinion. We note, however, that the district court's January 17 decision on this issue occupies five pages in the Federal Supplement. There is something troubling about disposing of a matter with a single line (and with no explicit reference to fees) that later requires resolution by a thorough written opinion. Moreover, we have found nothing in the record to suggest that the parties put the fees issue properly before the district court until they filed their petitions for fees at various times *after* November 6. Nevertheless, the district court stated its view that it had indeed addressed the question of attorneys' fees in its November 6 opinion. 794 F. Supp. at 258. The district court is in the best position to interpret its own orders, and we will not disturb such an interpretation absent a clear abuse of discretion. *In the Matter of Chicago, Rock Island & Pacific R.R.*, 865 F.2d 807, 810 (7th Cir. 1988). Therefore, although the form of the November 6 opinion creates puzzling ambiguities and procedural difficulties and may be misleading to litigants, the district court's interpretation of this opinion is not a clear abuse of discretion.

Characterizing the November 6 opinion as a final decision both on the merits and as an award of attorneys' fees has important jurisdictional consequences. Specifically, if the parties wished to challenge such a denial of attorneys' fees they had only two choices. They could appeal the decision within thirty days, Fed. R. App. P. 4(a)(1), or they could toll the time for appeal by filing a Rule 59(e)

motion to alter or amend judgment within ten days, exclusive of weekends and holidays. None of the parties in the first instance chose to appeal the November 6 order insofar as it pertained to attorneys' fees. The Hastert, Nieves, Chicago Urban League and Scott groups, however, did file a timely Rule 59(e) motion on November 14.[8] The district court denied this motion on January 17. The thirty day period for filing an appeal therefore ran from January 17, and expired (computing time as Fed. R. App. P. 26(a) requires) on February 18. The Hastert, Nieves, Scott and Chicago Urban League notices of appeal were therefore all timely filed.[9] We thus have jurisdiction over their appeals.

But unlike the other plaintiffs, the Rosebrook plaintiffs did not themselves appeal the November 6 order within 30 days or file an appeal-delaying Rule 59(e) motion within ten days. But their notice of appeal was nonetheless time-

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[8] Actually, these groups filed a motion to alter or amend judgment *and* a petition for attorneys' fees pursuant to section 1988. Ordinarily, such a petition for attorneys' fees would not be a proper Rule 59(e) motion. *White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 451 (1982). But because we have adopted the district court's view that it considered and denied attorneys' fees in its November 6 opinion, the later petition for such fees must be construed as a Rule 59(e) motion. Under our cases, all substantive motions served within ten days of the entry of judgment are treated as filed under Rule 59(e). *Charles v. Daley*, 799 F.2d 343, 347 (7th Cir. 1986). The petition for attorneys' fees was filed within ten days of the November 6 entry of judgment and it was substantive in the sense that it asked the district court to reverse its earlier denial of fees.

[9] In addition to appealing to this court, the Hastert and Nieves plaintiffs also moved the district court to reconsider its January 17 decision. Since the district court has not resolved these motions, one might think that their appeals are premature. But successive requests to alter or amend judgment, which are all these motions amount to, do not toll the time for appeal, *United States Equal Employment Opportunity Comm'n. v. Gurnee Inns, Inc.*, 956 F.2d 146, 148 (7th Cir. 1992), nor do they affect the finality of the judgment. *Charles v. Daley*, 799 F.2d 343, 347 (7th Cir. 1986).

ly filed since Fed. R. App. P. 4(a)(4) says that if a "timely motion under the Federal Rules of Civil Procedure is filed in the district court *by any party* . . . under Rule 59 to alter or amend the judgment . . . , the time for appeal *for all parties* shall run from the entry of the order denying . . . such motion" (emphasis added). The effect of Rule 4(a)(4) is to allow a party who neither moves the district court to amend its judgment nor appeals in a timely fashion to bootstrap onto another party's timely filed notice of appeal. Because the Rosebrook plaintiffs filed their notice of appeal on February 18, we have jurisdiction over their appeal from the November 6 order. And this is true despite the fact the Rosebrook plaintiffs' *own* Rule 59(e) motion to amend the judgment—filed after the ten day period for such motions had run—was properly denied as untimely.

II.

Thus having ascertained our jurisdiction, we now turn to the merits. Under 42 U.S.C. § 1973*l*(e), a court "in its discretion, may allow the prevailing party a reasonable attorney's fee" in an action, such as this one, "to enforce the voting guarantees of the fourteenth or fifteenth amendments." Pursuant to 42 U.S.C. § 1988, a court may make a similar award of fees to a "prevailing party" in a suit to enforce the provisions of 42 U.S.C. § 1983.[10] Although the statutes commit fee awards to the district court's discretion, Congress has nevertheless made clear that prevailing plaintiffs "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." S. Rep. 925, 94th Cong., 1st Sess. 40 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 807 (addressing § 1973*l*(e)); S. Rep. 1011, 94th Cong., 2d Sess. 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5912 (addressing § 1988). In any event,

[10] Because §§ 1973*l*(e) and 1988 contain nearly identical language and are driven by similar congressional purposes, we construe them similarly. *Cf. Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983).

our analysis begins by determining which parties, if any, prevailed.

This is not ordinary litigation. Most notably, the underlying controversy in this case, i.e., the fight over the configuration of Illinois' new congressional districts, was not between the plaintiffs and the defendant. The State Board of Elections is truly a nominal defendant, completely disinterested in the outcome of that fight. The real dispute was among the various plaintiffs. Each had a plan to offer and the winner, at least from a lay person's perspective, is the litigant whose plan and objectives (usually incorporated in its map) the district court adopted. Conveniently, this common-sense understanding of winners and losers coincides in large part with the Supreme Court's definition of "prevailing party."

A party prevails, within the meaning of the fee-shifting statutes, "if [it] succeeds on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). We agree with the district court, that "the principal issue in litigation during these proceedings involved the determination of which proposed [congressional districting] plan for the entire State of Illinois best met constitutional and statutory criteria." 794 F. Supp. at 259. On this score, the Hastert group is the clear winner, as the district court ultimately adopted its plan.

We also agree with the district court's conclusion that the Nieves plaintiffs prevailed. The Nieves plaintiffs brought suit on behalf of African-American and Hispanic voters, and sought the adoption of a map that created Illinois' first ever Hispanic majority congressional district. This was achieved without diluting the strength of the three existing African-American majority districts that were established in the 1981 redistricting. The Nieves group was thus, as we have noted, made up of two sub-groups, described throughout the litigation as the "African-American Nieves" and "Hispanic Nieves" plaintiffs. These two groups were at times represented separately before the district

court and sometimes took differing positions. But the two sub-groups acted in concert in petitioning for attorneys' fees, and the district court did not distinguish between them in declaring that "the Nieves group" prevailed. In support of its conclusion, the district court cited the fact that the Nieves plaintiffs played an instrumental role in the creation of the Hispanic super-majority district, as well as the fact that they "formally adopted" the prevailing Hastert map. 794 F. Supp. at 260. We agree with the district court's conclusion that the Nieves group should be considered a "prevailing party" in this litigation, primarily because its fundamental objective, the creation of an Hispanic district, was achieved by the litigation.

The district court also concluded that the Scott and Chicago Urban League plaintiffs did not prevail. *Id.* at 259-60. Of course, we owe these decisions substantial deference. *Shepard v. Sullivan*, 898 F.2d 1267, 1271 (7th Cir. 1990). In fact, the district court's determination must stand if *any* reasonable person could agree with it. *See Washington v. Sherwin Real Estate Inc.*, 694 F.2d 1081, 1087 (7th Cir. 1982).[11] But when a district court overlooks, either intentionally or inadvertently, relevant, binding precedent, its decision cannot stand. In defining "prevailing party," the district court relied exclusively upon *Hensley v. Eckerhart*, 461 U.S. 424 (1983). Although *Hensley* is a central case interpreting the fee-shifting statutes, the Supreme Court has provided additional guidance. In particular, the Court in *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782, 790 (1989), rejected the so-called "central issue" test that several lower courts had adopted following *Hensley*. Under that test, a party was deemed to have prevailed only if he "prevailed on

[11] Apart from its own possible inadequacies, this panel has had difficulty reaching final conclusions on some of the issues presented because (1) the district court offered few reasons for its results and (2) the parties did not initially spell out their arguments in the detail which they furnished at the rehearing stage. We have had to spend many hours searching for clues in the record.

the central issue by acquiring the primary relief sought." *Id.* at 787 (citation omitted). In rejecting this formulation, the Court concluded that the degree of a plaintiff's success in relation to the other goals of the lawsuit was relevant only to the determination of the size of a reasonable fee, "not to eligibility for a fee award at all." *Id.* at 790. The court reiterated that success on *any* significant issue in litigation conferred prevailing party status. *Id.* at 791 (emphasis supplied).

The district court noted that the Scott plaintiffs intervened "for the limited purpose of addressing the configuration of a relatively small geographic area in the vicinity of East St. Louis, Illinois, contained in one of the pretrial *Hastert* plans." 794 F. Supp. at 259. The court went on to conclude that

> [p]laced in the context of arduous . . . proceedings conducted to review only redistricting plans for the entire state, the *Scott* [plaintiffs'] fleeting presence to address their concerns regarding a tiny fraction of the state, their neutral stance regarding the merits of the principal issue to be litigated and their absence from the trial proceedings compel the conclusion that they do not constitute a statutory prevailing party . . . .

Id. (internal quotation marks omitted). Certainly, the district court is correct that, in terms of the entire redistricting process, the Scott plaintiffs' claims were not particularly expansive. Under the "central issue" test, they perhaps would not be entitled to fees. But the Supreme Court has rejected that analysis. We find that the configuration of any of Illinois' 20 congressional districts was a significant issue in the litigation, and, after *Garland*, success on any such issue is enough to trigger an award of fees. Under this standard, the Scott plaintiffs undoubtedly prevailed. They urged that the congressional districts encompassing East St. Louis be configured in a particular way. They convinced the Hastert group to incorporate their proposed configuration into the Hastert master plan.

When the district court adopted the Hastert plan, the Scott group accomplished everything it set out to achieve.[12] Thus, they too prevailed.

The result with respect to the Urban League plaintiffs is much less clear. In finding that the League plaintiffs did not prevail, the district court observed that these plaintiffs, like the Scott plaintiffs, focused their attention on a small portion of the state, in this case the four minority districts in Chicago. It further noted that while the Urban League plaintiffs' proposed map "closely tracked the *Hastert* configuration of the minority districts," they nonetheless "chose to proceed on the basis of their own separate map." 794 F. Supp. at 260.

As we noted in our discussion of the Scott plaintiffs, the fact that the Urban League group focused its attention on only a small part of the state does not preclude it from being declared a "prevailing party," *see Hensley*, 461 U.S. 424. According to the district court's analysis, whether the Urban League plaintiffs prevailed, then, turns on the determination that they proceeded on the basis of their own separate map, rather than adopting the Hastert map.

The Chicago Urban League group entered the litigation in order to assure that—in the context of creating an Hispanic majority district—the strength of the three African-American majority districts not be diluted. This was the League group's purpose and, if they achieved it, they prevailed. In first bringing suit, they submitted a proposed map for these four districts (one Hispanic and three African-American). But as the litigation progressed the dif-

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[12] It is of no consequence that the Scott group achieved its goals without litigating to the bitter end. Indeed, the Supreme Court has held that a party who achieves success by settling is entitled to attorney's fees. *Maher v. Gagne*, 448 U.S. 122, 129 (1980). All that is important is for the party to obtain the "substance of what [it] sought." *Hewitt v. Helms*, 482 U.S. 755, 761 (1987). The Scott plaintiffs undeniably did so.

ferences among the various parties' positions narrowed. In fact, before trial it became clear that both of the proposed state-wide maps (the ones proposed by the Rosebrook and Hastert groups), called for the creation of an Hispanic majority district. The Hispanic Nieves plaintiffs, their goal achieved, essentially dropped out of the litigation, and the African-American Nieves plaintiffs joined forces with the Urban League group. Thus, at a pre-trial hearing on October 3, 1991, an attorney for the African-American Nieves plaintiffs said that "the Nieves African-American plaintiffs and the Urban League are, have taken identical positions," and noted that "those two parties would merge into one" at trial. Later in that same pre-trial hearing, an attorney for the Urban League plaintiffs noted that they were negotiating with the Hastert group, and that if those negotiations proved successful, they might, at trial, "formally request that they adopt the Hastert amended map."

While no such motion was made during the trial, the negotiations continued, and on October 15, 1991, the Hastert plaintiffs filed with the court their third amended redistricting plan. That plan incorporated changes worked out with the African-American Nieves and Urban League plaintiffs. Following the trial, the African-American Nieves and Urban League plaintiffs filed a joint post-trial brief, and in it they called on the court to adopt the third amended Hastert map. The court ultimately did so. 777 F. Supp. at 662.

The substance of the debate at this point focused on the identity of the congressional district in which to locate Chicago's Second Ward. The Second Ward had historically been part of the First Congressional District, but the Rosebrook map would have moved it into the neighboring Seventh District. The Hastert map, however, left the Second Ward in the First District. In adopting the Hastert map, the position urged by the Urban League group—that Chicago's Second Ward remain part of the First Congressional District—prevailed.[13]

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[13] Hon. Bobby Rush, alderman from the Second Ward, was in 1992 elected to Congress to represent the First District.

The failure of the Urban League plaintiffs formally to move the court to adopt the Hastert map, as their lawyer suggested in a pre-trial conference that they might, could conceivably constitute grounds for concluding that they *did not* adopt the Hastert map and therefore that they did not prevail. While the district court did not explain the basis of its determination, perhaps it relied on the failure of the Urban League plaintiffs to make such a motion in concluding that they proceeded "on the basis of their own separate map." 794 F. Supp. at 260. But such a conclusion strikes us as exceedingly formalistic, and is difficult to reconcile with the district court's conclusion that the Nieves plaintiffs—whose position merged with that of the Urban League group—*did* adopt the Hastert map. The issue before us is whether the district court abused its discretion in finding that the Nieves plaintiffs prevailed while the Urban League plaintiffs did not. We must bear clearly in mind that there can be no abuse of discretion if any rational person could agree with the conclusion of the district court. Admittedly, the task of the Nieves plaintiffs in achieving prevailing party status is easier since their predominant goal was to devise a district with an Hispanic voting majority. This is a clear goal that was clearly achieved. The Urban League plaintiffs, on the other hand, had the more complicated goal of achieving the Hispanic district while protecting against diluting the three pre-existing African-American districts. As the process unfolded, the League plaintiffs (in alliance with the African-American Nieves plaintiffs) also argued for the inclusion of the Second Ward (where Bobby Rush—a potential congressional candidate—was a resident[14]) in the First Congressional District. The Hayes-Collins group wanted to move the Second Ward (and Rush) into the Seventh District.

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[14] While the Constitution requires only that a representative be an "Inhabitant of that State in which he shall be chosen," U.S. Const., Art. I, § 2, candidates who reside in the district they are seeking to represent surely have an electoral advantage over those who live in other districts.

The League plaintiffs thus "prevailed" as to the creation of the Hispanic district, the preservation of three African-American districts and retention of the Second Ward in the First District. As noted, however, the Urban League plaintiffs did not move formally to *themselves* adopt the Hastert map, although they did call on the district court to adopt that map. This is surely an extraordinarily fine distinction, almost irrelevant to the substance of the redistricting process. The question is whether it is a distinction that might recommend itself to at least one rational decision-maker. After much thought we believe this distinction cannot pass even that test. We think therefore that the Urban League must also be considered a prevailing party.

That leaves the appeal by the Rosebrook plaintiffs. Because the Rosebrook plaintiffs did not timely petition the district court to reconsider its November 6 order, we do not have the benefit of the district court's determination whether they were a prevailing party.[15] But we nevertheless affirm the district court's November 6 order denying them fees, because we consider it entirely clear that they are not prevailing parties. In the end, the district court was faced with a choice between two maps, one put forward by the Hastert group (favoring Republicans) and another put forward by the Rosebrook plaintiffs (favoring Democrats). In its November 6 order, the court found that the Hastert map better satisfied the constitutional and statutory criteria, and thus adopted the Hastert plan. The Rosebrook group now argues that it was a substantial factor in eradicating conduct that violates the Voting Rights

[15] We know only that when the Rosebrook plaintiffs moved the district court to reconsider its December 27 decision to deny their Rule 59(e) motion for reconsideration as untimely filed, the district court denied the motion as moot, in light of its January 17 order. But we do not know for certain whether the district court considered the motion moot because, in its view, the Rosebrook plaintiffs did not prevail, or rather because it held in its January 17 order that even the prevailing parties were not entitled to attorneys' fees.

Act. *See Maloney v. City of Marietta*, 822 F.2d 1023 (11th Cir. 1987). But redistricting cases like this one are unlike ordinary voting rights cases. As we have noted, in the redistricting context the touchstone for whether a party "prevails" is simply whether that party's map (or the map the party ultimately embraces) is ultimately adopted. We thus have relatively little difficulty concluding that the Rosebrook plaintiffs are not prevailing parties, and thus not entitled to attorneys' fees.

In sum, we agree with the district court that the Hastert and Nieves groups did prevail. But we disagree with its conclusions regarding the Scott group and the Urban League group. And we find that they too, were prevailing parties. As a result, the Hastert, Nieves, Scott and Urban League groups are prima facie entitled to fees. The Rosebrook plaintiffs, who did not prevail, are not entitled to fees.

III.

Our analysis does not end here, however, since the district court went on to find that the existence of "special circumstances" precluded an award of fees even to prevailing parties. Although the fee shifting statutes commit fee awards to a district court's discretion, such discretion is, as previously noted, quite narrow once prevailing party status has been determined. *See, e.g., New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 68 (1980). And we find that the reasons given by the district court for denying fees to prevailing parties in this case are inadequate.

The district court stated that "Congress' primary purpose in providing attorney's fees in civil rights litigation . . . was 'to eliminate financial barriers to the vindication of constitutional rights . . . .'" 794 F. Supp. at 260 (quoting *Seattle School District v. Washington*, 633 F.2d 1338, 1348 (9th Cir. 1980), *aff'd*, 458 U.S. 457 (1982)). The court went on to note that the plaintiffs in this case "do not appear to be drawn from the ranks of the disempowered and financially disadvantaged citizenry that Congress had in mind when enacting [fee-shifting statutes]." *Id.* The district court is wrong on this point for two reasons. First, despite the

fact that certain of the plaintiffs in this matter were elected officials, there is no evidence that they were particularly wealthy. Second, and more importantly, the Supreme Court has consistently held that a plaintiff's ability to pay for legal representation is not a special circumstance justifying denial of attorneys' fees. *See, e.g., Venegas v. Mitchell*, 495 U.S. 82, 87-88 (1990); *Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989).

The district court also asserted that an award of fees would be unjust because "the plaintiffs merely shifted the legislative lobbying process that typically attends congressional redistricting to a federal judicial arena." 794 F. Supp. at 261. This might be true, but it is hardly a reason to deny attorneys' fees. It is surely regrettable that the Illinois General Assembly was unable to enact a new congressional district scheme and that the taxpayers of the State of Illinois must now pay for their dereliction. But such is the case whenever the political branches of government fail to vindicate important rights and the affected parties must seek a judicial hearing. There can be no doubt, moreover, that fee awards may issue against state and local governments. *Hutto v. Finney*, 437 U.S. 678, 694 (1978). Thus, the State Board of Elections, as an agency of the state, may properly be held accountable for the prevailing parties' attorneys' fees.[16]

In reviewing these thorny fees matters in this redistricting case, we recognize the perhaps peculiar circumstances of redistricting cases generally. Here, all of the plaintiffs "contributed" to the final result in the sense that, by taking positions that were more or less, in whole or in part, "incorporated" into the accepted map, all parties arguably

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[16] It is of no consequence that the State Board of Elections played no active role in the proceedings and agreed to enforce whatever plan the district court adopted, since fees may be taxed even against entities whose role is limited to enforcement of regulations they played no role in promulgating. *Crosby v. Bowling*, 683 F.2d 1068, 1073 (7th Cir. 1982). Nor is the Board's putative "good faith" a special circumstance justifying a refusal to award fees. *Lampher v. Zagel*, 755 F.2d 99, 104 (7th Cir. 1985).

helped move the process forward toward its eventual culmination. On the other hand, there may be greater or lesser, formal or substantial, differences between the maps of the "winners" and the maps of the "losers." The Hastert, Nieves, Scott and Urban League plaintiffs have been declared the winners because exactly what they advocated has been accepted.

The State Board of Elections, the nominal defendant, has no interest in the eventual outcome except that there *be* an outcome which it can implement. Yet the State Board may be held liable for fees to the prevailing parties, whose status as such depends upon the *relative* success of their position in relation to the success of the other plaintiffs. These configurations of claim to liability and of success to failure are essentially unique to redistricting cases. In such cases, liability is usually imposed on a neutral (and nominal) defendant, and successful fees claims are awarded to the *relatively* successful plaintiffs. In this case, we are attempting to apply principles developed in a wide range of civil rights cases to the *sui generis* category of redistricting cases. As might be expected, these principles do not provide a close fit to this subject matter. It might be appropriate and helpful, by statute or otherwise, to develop a set of rules specifically governing attorneys' fees in redistricting cases, but that is not our task here.

For the foregoing reasons, we REVERSE the judgment of the district court insofar as it held that the Scott group and the Urban League group are not prevailing parties, and AFFIRM the district court's judgment that the Hastert and Nieves plaintiffs are prevailing parties. We also REVERSE the district court's determination that special circumstances exist so as to preclude the award of attorneys' fees to prevailing parties, and AFFIRM the court's determination that the Rosebrook group is not entitled to attorneys' fees. Finally, we REMAND the case with instructions to award reasonable attorneys' fees to the prevailing parties.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED WITH INSTRUCTIONS

COFFEY, *Circuit Judge*, dissenting. As I discuss *infra* at 27-29, I reiterate my previous objections filed in the original panel opinion. *See Hastert v. State Board of Elections*, Nos. 92-1397 et al., slip op. at 21-24 (7th Cir. Dec. 17, 1993) (Coffey, J., dissenting). Additionally, I agree with the majority's determination in its amended opinion that the Rosebrook plaintiffs are not prevailing parties. In litigation of this nature, the various plaintiff's groups are competing against each other and in this case the court determined that the Hastert plan prevailed over the Rosebrook plan. Based on the lower court's selection of the Hastert plan, the Rosebrook plaintiffs cannot be viewed as prevailing parties.

As an initial matter, I agree with the majority that the November 6, 1991 district court opinion disposed of the attorneys' fees with the phrase "all parties to these consolidated cases bear their own costs." *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 662 (N.D. Ill. 1991) (*Hastert I*). I fail to understand the need for the majority's extensive criticism of the district court in regard to the attorneys' fees. In the lower court's subsequent opinion, *Hastert v. Board of Elections*, 794 F. Supp. 255 (N.D. Ill. 1992) (*Hastert II*), it treated the phrase "all parties to these consolidated cases bear their own costs" as resolving the attorneys' fees question. The three-judge district court was obviously in the best position to know whether it intended to deny attorneys' fees. Rather than criticizing the court for its holding, we should accept the lower court's interpretation of its own order and proceed to the merits of the instant appeal.

Secondly, I disagree with the majority's determination in the amended opinion to add the Chicago Urban League as a prevailing party.[1] The majority holds that the Urban

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[1] In the original opinion, the majority ruled that the Urban League was not a prevailing party because "the Chicago Urban League plaintiffs insisted on their own map. They did not get it. On an issue like this, where either result would have been sustainable, the district court is in the best position to determine whether fees are appropriate. Here the district court did not abuse its discretion." *Hastert*, slip op. at 16-17 (7th Cir. Dec. 17, 1993).

League prevailed because (1) the League indicated prior to trial that it *might* adopt the Hastert plan, and (2) the League's goals (a Hispanic majority district and three African-American majority districts) were achieved through the Hastert plan. The district court ruled that the Urban League had not prevailed since it failed to adopt the Hastert plan and instead proceeded on its own separate map; the League's attorneys never followed through on the representation that they might "formally request that [the League] adopt the Hastert amended map." The majority originally agreed with the trial court but in the amended opinion changes course and reasons that such a distinction is too formalistic. I disagree. Rather than being formalistic, the district court properly refused to reward a plaintiff who was hedging its bets. Counsel for the Urban League was attempting to play both sides against the middle and accomplish the League's goals without committing to a position. By indicating before trial that it was contemplating adoption of the Hastert plan, but then never formally adopting that plan, the Urban League was able to reap the benefit of being "on board" the Hastert plan but if the district court ultimately adopted the Rosebrook plan, the Urban League attorneys had positioned themselves to present another argument that it prevailed based in part on the fact that it had never adopted the Hastert plan. A court of appeals should not fall prey to trial tactics of this nature.

The lower court ruled that the Urban League did not prevail and who is in a better position than the trial court to make that determination? I am unwilling to hold that the trial court abused its discretion on this matter, moreover, I am unaware of any case law warranting the reversal of the district court for *"[a] decision on a fee award is left to the discretion of the district court in light of its superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters. . . . A district court does not abuse its discretion . . . if reasonable persons could differ over the view it adopts." McNabola v. Chicago Transit*

Authority, 10 F.3d 501, 518 (7th Cir. 1993) (citations and quotation marks omitted) (emphasis added). *As far as I know*, McNabola *is the law of the Seventh Circuit. The fact that the majority has changed its mind (from the first to the second opinion) about whether the Urban League prevailed is certainly evidence that "reasonable persons could differ" and mandates that the trial court did not abuse its discretion. Id.* An appellate court should be extremely reluctant to hold that the knowledgeable and experienced members of the three-judge panel abused their discretion. Moreover, simply because the Nieves plaintiffs, who did prevail, had some goals in common with the League (creation of Hispanic majority district), does not warrant the conclusion that the League also prevailed. In this instance, the trial court made findings on the very same factual issues the panel majority raises, i.e., the role the Urban League played in creating the four minority congressional districts, and the trial court found that the League ultimately "chose to proceed on the basis of their own separate map." *Hastert II*, 794 F. Supp. at 260. This finding was not an abuse of discretion.

Regardless of which parties prevailed, I continue to adhere to the position enunciated in my prior dissenting opinion agreeing with the three-judge district court[2] that *special circumstances mitigate against an award of attorneys' fees. Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). The district court found special circumstances render an award of attorneys' fees "unjust" in a case where (1) "the Board has played no active role in these proceedings and agree[d] to abide by the judgment of th[e] court," *Hastert I*, 777 F. Supp. at 639, (2) the litigation only involves plaintiffs' groups vying against one another and above all, (3) the redistricting should have occurred in the state legislative forum where attorneys' fees were unavailable. I remain of the opinion that this court should consider *en banc* whether

[2] *Hastert II*, 794 F. Supp. at 260-61.

the district court's interpretation of the fee statute is improper.

The amended majority opinion makes it even more clear that special circumstances make an award of fees in this type of case "unjust." *Id.* In deciding to confer prevailing party status on all but the Rosebrook plaintiffs and then proceeding to award the prevailing parties attorneys' fees, the majority obviously found it necessary to and did in fact expand the parameters of the standard for determining prevailing party status. A decision of this nature will only invite more challenges in redistricting litigation by encouraging special interest litigants to jump on the bandwagon (1) hire counsel, (2) draft a redistricting plan reflecting their own special concerns, (3) join in the statewide plan with the greatest chance of success, and (4) saddle the taxpayers with payment of their attorneys' fees under this newly created standard. Moreover, I am fearful that the majority opinion will accomplish nothing but to encourage groups like those before us to stonewall during the state legislative process (preventing the legislature from timely drafting a redistricting map) and then shift the battle to the federal courtroom where the plaintiffs' attorneys can receive a windfall of compensation for their services at the taxpayers' expense.[3]

Neither the State of Illinois nor any other governmental body should be responsible for the attorneys' fees of the

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[3] The majority suggests that the legislature's inability to draft a redistricting plan was due in part to the fact there was a Republican governor and a Democratic legislature. This attempt at assigning blame is in error because the legislature, which was controlled by one party, never even passed or voted on a plan. Thus, the Republican governor was not called upon to sign any legislation. The failure to pass redistricting legislation was likely attributable to the various plaintiff groups vying against one another. The fact that Illinois failed to pass redistricting legislation following the census of 1970 and 1980 is of little consequence for in those years, one party controlled the house and the other controlled the senate.

prevailing parties in litigation involving a truly nominal defendant who played no active role in the proceedings. Attorneys' fees awards are especially uncalled for when the unmeritorious claims are based primarily on the litigants' partisan interests, i.e., drawing the most favorable redistricting boundries, as opposed to protection of recognized constitutional rights of aggrieved parties. As I stated in my prior dissent, fee shifting in civil rights litigation is not intended to result in a "windfall" for attorneys, yet that is precisely what occurred in this instance. *Farrar v. Hobby*, 113 S. Ct. 566, 575 (1992).

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[Dated December 17, 1993]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 92-1397, 92-1398, 92-1399,
92-1402 and 92-1403

DENNIS J. HASTERT, HARRIS FAWELL,
JOHN E. PORTER, PHILIP M. CRANE,
HENRY J. HYDE, and ROBERT H. MICHEL,

Plaintiffs,

and

JOHNNY SCOTT and BEN HOWARD,

Intervenor Plaintiffs-Appellants,

v.

ILLINOIS STATE BOARD OF ELECTION
COMMISSIONERS, JOHN J. LANIGAN,
THERESA M. PETRONE, RICHARD A. COWEN,
LAWRENCE E. JOHNSON, DAVID E. MURRAY,
LANGDON D. NEAL, WANDA L. REDNOUR and
HANNELORE HUISMAN,

Defendants-Appellees.

DENNIS J. HASTERT, HARRIS FAWELL,
JOHN E. PORTER, PHILIP M. CRANE,
HENRY J. HYDE, ROBERT H. MICHEL,
and THOMAS W. EWING,

Plaintiffs-Appellants,

v.

(Caption continued on following page)

STATE BOARD OF ELECTIONS, JOHN J. LANIGAN, THERESA M. PETRONE, RICHARD A. COWEN, LAWRENCE E. JOHNSON, DAVID E. MURRAY, LANGDON D. NEAL, WANDA L. REDNOUR and HANNELORE HUISMAN,

Defendants-Appellees.

WILFREDO NIEVES, AL JOHNSON, LINDA CORONADO, BOBBY RUSH, JESUS GARCIA, REV. WILLIE BARROW, RAFAEL BORIA, MIGUEL DEL VALLE, ROBERT L. LUCAS, LEON D. FINNEY, JR., REV. CLAY EVANS, JOSEPH GARDNER, LUIS V. GUTIERREZ, REGNER SUAREZ, JOSEPH BERRIOS, MIGUEL A. SANTIAGO, and NEOMI HERNANDEZ,

Plaintiffs-Appellants,

v.

ILLINOIS STATE BOARD OF ELECTION COMMISSIONERS, JOHN J. LANIGAN, THERESA M. PETRONE, RICHARD A. COWEN, HANNELORE HUISMAN, LAWRENCE E. JOHNSON, DAVID E. MURRAY, LANGDON D. NEAL and WANDA L. REDNOUR,

Defendants-Appellees.

THE CHICAGO URBAN LEAGUE, CRAIG R. COLLINS, MARK ALLEN, and NIKOLAS C. THEODORE,

Plaintiffs-Appellants,

v.

STATE BOARD OF ELECTIONS, JOHN J. LANIGAN, THERESA M. PETRONE, RICHARD A. COWEN, JOHN P. DAILEY, LAWRENCE E. JOHNSON, DAVID E. MURRAY, LANGDON D. NEAL and WANDA L. REDNOUR,

Defendants-Appellees.

(Caption continued on following page)

ANN ROSEBROOK, DARYL BARKLOW,
AMIEL CUETO, RICHARD MARK,
JEANELLE NORMAN, CAROLYN TONEY,
LEE BABCOCK, RAYMOND OLIVER,
BARBARA POSHARD, WILLIAM MATTHEWS,
GERALD HAWKINS, and EVA SAVALA,

Plaintiffs-Appellants,

v.

STATE BOARD OF ELECTIONS,
JOHN J. LANIGAN, THERESA M.
PETRONE, RICHARD A. COWEN,
HANNELORE HUISMAN, LAWRENCE E.
JOHNSON, DAVID E. MURRAY,
LANGDON D. NEAL and WANDA L. REDNOUR,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
Nos. 91-C-4028, 91-C-4154, 91-C-4643, 91-C-4656 and 91-C-5472—
Michael S. Kanne, Charles R. Norgle, Sr., and
Suzanne B. Conlon, *District Judges.*

ARGUED JANUARY 7, 1993—DECIDED DECEMBER 17, 1993

Before CUDAHY, COFFEY and ROVNER, *Circuit Judges.*

CUDAHY, *Circuit Judge.* We are asked here to review a decision of a three-judge district court denying attorneys' fees to certain parties involved in litigation regarding congressional redistricting in Illinois following the 1990 census. We are presented initially with some rather puzzling jurisdictional questions. To resolve them, we must recount the procedural history of this litigation in regrettably copious detail.

Because Illinois' population grew during the 1980s at a rate slower than that of the United States as a whole, the number of congressional seats apportioned to Illinois was reduced from 22 to 20. The task thus fell to the Illinois legislature to implement a constitutionally acceptable congressional redistricting plan, taking into account the fewer districts allocated to the state.[1] This is not an easy task under any circumstances, but it may be virtually impossible when the governor is of a different political party than a majority of the members of both houses of the legislature.[2] Such was the situation in Illinois in 1991. And, quite predictably, the Illinois General Assembly failed to enact a redistricting plan by the constitutionally mandated June 30, 1991 deadline. Indeed, the legislature failed even to bring a redistricting plan to the floor for debate.

Anticipating this legislative deadlock, the Republican Party members of the Illinois congressional delegation (the "Hastert" plaintiffs or group) filed the initial action in this matter on June 27, 1991. The Hastert plaintiffs sought a declaration that the present Illinois congressional districts were unconstitutional because of changes reflected in the 1990 census. They also sought to enjoin the Illinois State Board of Elections from conducting the 1992 congressional elections under the congressional district plan then in effect, and submitted their own redistricting proposal to replace the outdated map. The Chief Judge of this court convened a three-judge district court to hear the case, as 28 U.S.C. § 2284(a) requires.

On July 3, 1991, a group of Hispanic and African-American voters (the "Nieves" plaintiffs or group) filed a similar

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[1] Article 4, § 3(b) of the Illinois Constitution states, "In the year following each Federal decennial census year, the General Assembly by law shall redistrict the Legislative and Representative Districts."

[2] Redistricting plans are within the veto power of an Illinois governor. *See Williams v. Kerner*, 30 Ill. 2d 11, 195 N.E.2d 680 (1964).

action. In addition to the relief requested by the Hastert group, the Nieves plaintiffs sought the creation of a congressional district containing a majority of Hispanic voters which, they maintained, section two of the Voting Rights Act, 42 U.S.C. § 1973, required. The Nieves and Hastert actions were later consolidated.

On July 24, 1991, a group of voters ostensibly acting on behalf of certain members of the Illinois congressional delegation affiliated with the Democratic Party (the "Rosebrook" plaintiffs or group) filed still another similar action, which was subsequently consolidated with the Hastert and Nieves cases. On the same day, Representative Cardiss Collins and Representative Charles Hayes, along with several voters from their respective African-American majority districts (the "Collins" plaintiffs or group), filed a fourth action that was also consolidated with the Hastert and Nieves cases. Finally, the Chicago Urban League, purporting to represent the interests of voters in the existing African-American majority congressional districts (the "Chicago Urban League" plaintiffs or group), filed its own suit on August 29, 1991. This too was consolidated with the others.[3]

The district court issued its decision on the merits on November 6, 1991, enjoining the Board from using the existing congressional district plan and ordering it to put into effect the plan proposed by the Hastert plaintiffs. *Hastert v. State Board of Elections*, 777 F. Supp. 634 (N.D. Ill. 1991). In the final sentence of its opinion, the district court ordered that "all parties to these consolidated cases bear their own costs." 777 F. Supp. at 662. On November 14, 1991, the Hastert, Nieves, Chicago Urban League and Scott groups moved the district court to

[3] Several individuals and organizations were permitted to intervene in the consolidated action, including Johnny Scott and Ben Howard (the "Scott" plaintiffs or group), acting individually and as representatives of local chapters of the National Association for the Advancement of Colored People.

alter or amend its judgment to award them costs as prevailing parties. They also filed a petition for an award of their respective attorneys' fees pursuant to 42 U.S.C. §§ 1973*l*(e) and 1988. On November 21, 1991, the Collins plaintiffs moved the court for leave to file a petition for attorneys' fees. Also on November 21, the Rosebrook plaintiffs filed a Rule 59(e) motion to alter or amend the judgment.[4] While this motion was still pending, the Rosebrook plaintiffs filed, on December 24, 1991, a motion for leave to file a petition for attorneys' fees and expenses.

The district court denied the Rosebrook plaintiffs' Rule 59(e) motion on December 27, 1991, and on January 7, 1992, the court denied as untimely their motion for leave to file a petition for fees. On January 13 the Rosebrook group moved the court to reconsider its denial of their fee motion. On January 17, 1992, the district court issued a memorandum opinion denying the Hastert, Nieves, Collins, Chicago Urban League and Scott groups' motions for costs and attorneys' fees. *Hastert v. State Board of Elections*, 794 F. Supp. 255 (N.D. Ill. 1992). In the same opinion, the court ordered that the cost of publishing notices of the action in newspapers throughout the state be divided equally among the Hastert, Nieves, Rosebrook and Collins groups. 794 F. Supp. at 261. Four days later, on January 21, the court denied as moot the Rosebrook plaintiffs' January 13 motion for reconsideration.

On January 28, the Nieves plaintiffs moved the district court to reconsider its January 17 decision denying attorneys' fees. The Hastert plaintiffs filed an identical motion on January 29. On January 31, the Collins plaintiffs moved

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[4] The Rosebrook plaintiffs asked the court to amend its judgment to state that the Hispanic majority district proposed by the Hastert plaintiffs, and later adopted by the court, was substantially similar to the Hispanic majority district proposed by the Rosebrook plaintiffs. The apparent purpose of this motion was to buttress the Rosebrook plaintiffs' claim that they were prevailing parties and thus entitled to attorneys' fees.

the court to reconsider its denial of attorneys' fees and its allocation of the costs of publishing notice. The district court has never ruled on these motions. Several plaintiff groups next sought to vest jurisdiction in this court. The Scott plaintiffs on February 13, the Hastert and Nieves plaintiffs on February 14, and the Chicago Urban League group on February 18, filed notices of appeal with respect to the district court's January 17 decision denying attorneys' fees. Also on February 18, the Rosebrook plaintiffs filed a notice of appeal with respect to the district court's November 6, 1991, judgment, as well as from the December 27 order denying their motion to alter or amend that judgment, the January 7, 1992, order denying their motion for leave to file a petition for fees, the January 17 opinion and the January 21 order denying their motion to reconsider. The Collins plaintiffs had not filed a notice of appeal by the time these cases were set for argument on appeal.[5]

We have jurisdiction here, if at all, pursuant to 28 U.S.C. § 1291, which vests in the courts of appeals jurisdiction over "all final decisions of the district courts of the United States." As an initial matter, we note that we do not have jurisdiction over the merits of this case because such appeals must be made directly to the United States Supreme Court. *See* 28 U.S.C. § 1253 ("[A]ny party may appeal to the Supreme Court from an order [pertaining to an] injunction in any . . . action . . . required . . . to be heard and determined by a district court of three judges.") and 28 U.S.C. § 1291 (courts of appeals have jurisdiction of appeals from final decisions of the district courts "except where direct review may be had in the Supreme Court").[6]

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[5] On February 27, 1992, the Collins' plaintiffs moved the district court to rule on its motion for reconsideration of the denial of fees. The court has yet to dispose of this motion.

[6] Accordingly, the Rosebrook plaintiffs' notice of appeal is ineffective to the extent it seeks review of the merits of the district court's redistricting decision.

Appeal from the district court's denial of attorneys' fees, however, is properly made to this court. *See Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 737 n.16 (1980) (Supreme Court does not have jurisdiction under § 1253 if only attorneys' fees questions are appealed). It thus follows that awards of attorneys' fees are appealable independent of the merits and constitute separate judgments for purposes of § 1291. *People Who Care v. Rockford Board of Education District No. 205*, 921 F.2d 132, 134, 135 (7th Cir. 1991). But such fee awards, or in this case denials, must be final in order to trigger our § 1291 jurisdiction.

The district court's November 6 opinion was unquestionably a final decision on the merits. But there is a considerable question whether it said anything, final or otherwise, about attorneys' fees. The only pronouncement of the district court in its November 6 opinion that might be construed to reach the attorneys' fees issue is its final sentence: "[P]arties to these consolidated cases shall bear their own *costs*." 777 F. Supp. at 662. Sections 1973*l*(e) and 1988 provide that "prevailing parties" in actions to enforce constitutional voting guarantees and certain provisions of the civil rights laws are entitled to "a reasonable attorney's fee as part of the *costs*." Thus, there is no logical impediment to concluding that the district court's November 6 decision resolved, albeit *sub silentio*, the parties' entitlement to attorneys' fees. However, we are not entirely convinced that this is a correct view, and we are quite certain that the language of the district court, if intended to deal with attorneys' *fees* (in addition to routine court *costs*) was ill-chosen. Indeed, it would not be irrational to conclude that the district court's order had nothing to do with attorneys' fees.

Federal Rule of Civil Procedure 54(d) provides that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." The Supreme Court has instructed that 28 U.S.C. § 1920 defines the term "costs" as it is used in Rule 54(d). *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 441 (1987). Section 1920 au-

thorizes the taxation of certain rather routine litigation expenses, including clerk, marshal and court reporter fees, "as costs." Although Rule 54(d) creates a presumption that the prevailing party will recover these costs, the decision to make the award of costs is entrusted to the sound discretion of the district court. *Soler v. Waite*, 989 F.2d 251, 254-55 (7th Cir. 1993). As a result, district courts routinely direct that prevailing parties are not entitled to Rule 54(d) costs through concise orders, frequently no longer than a single sentence. *See, e.g., Tolle v. Carroll Touch, Inc.*, 813 F. Supp. 1368 (C.D. Ill. 1993); *Harlan E. Moore Charitable Trust v. United States*, 812 F. Supp. 130 (C.D. Ill. 1993); *Nalco Chemical Co. v. Hydro Technologies, Inc.*, 809 F. Supp. 672 (E.D. Wis. 1992); *Ridgefield Park Transportation v. Uhl*, 803 F. Supp. 1467 (S.D. Ill. 1992). The district court's November 6 "tag line" that the parties to this litigation were to "bear their own costs" is arguably an adequate exercise of its discretion to deny Rule 54(d) costs, as that term is defined by 28 U.S.C. § 1920.[7] But attorneys' fees would seem to be "costs" of a different sort.

Before the Supreme Court decided *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), many federal courts believed that they had the power in certain cases, contrary to the so-called "American" rule that parties are to bear their own costs of legal representation, to award attorneys' fees to prevailing parties as a component of Rule 54(d) costs. In *Alyeska*, however, the Court disapproved this practice and held that federal courts may order the losing party to pay the winner's attorneys' fees only if Congress has authorized such fee awards by statute. *Id.* at 263-64. There is no dispute that sections 1973*l*(e) and 1988 are statutes of this type nor, as a result, is there any question that the district court

[7] Hereafter, when we use the phrases "Rule 54(d) costs" or "routine Rule 54(d) costs" we will be referring to the set of costs described by 28 U.S.C. § 1920.

had the power to decide which parties to the present litigation, if any, were entitled to attorneys' fees. There is legitimate room for doubt, however, that the district court exercised this power on November 6.

It is true that even after *Alyeska* we continued to treat requests for attorneys' fees under section 1988 as motions for costs governed by Rule 54(d). *See Hairline Creations, Inc. v. Kefalas*, 664 F.2d 652, 659 (7th Cir. 1981) and *Bond v. Stanton*, 630 F.2d 1231, 1234 (7th Cir. 1980), *cert. denied sub nom. Blinzinger v. Bond*, 454 U.S. 1063 (1981). But this is the only similarity section 1988 attorneys' fees have to Rule 54(d) costs. While district courts have broad discretion to award or deny Rule 54(d) costs, their "discretion to deny a fee award [under section 1988] to a prevailing party is narrow." *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 68 (1980). Indeed, we have held that prevailing civil rights plaintiffs are entitled to their attorneys' fees "as a matter of course." *Entertainment Concepts, Inc. III v. Maciejewski*, 631 F.2d 497, 506 (7th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981). *See also Dawson v. Pastrick*, 600 F.2d 70, 79 (7th Cir. 1979). Although a district court may be able to dispose of routine Rule 54(d) costs with a single, off-hand line at the end of a lengthy decision on the merits, a denial of section 1988 attorneys' fees would seem to require more deliberation.

Admittedly, we cannot know with any degree of certainty whether the district court considered the attorneys' fee issue before issuing its November 6 opinion. We note, however, that the district court's January 17 decision on this issue occupies five pages in the Federal Supplement. There is something troubling about disposing of a matter with a single line (and with no explicit reference to fees) that later requires resolution by a thorough written opinion. Moreover, we have found nothing in the record to suggest that the parties put the fees issue properly before the district court until they filed their petitions for fees at various times *after* November 6. Nevertheless, the district court stated its view that it had indeed addressed the question of attorneys' fees in its November

6 opinion. 794 F.Supp. 258. The district court is in the best position to interpret its own orders, and we will not disturb such an interpretation absent a clear abuse of discretion. *In the Matter of Chicago, Rock Island & Pacific R.R.*, 865 F.2d 807, 810 (7th Cir. 1988). Therefore, although the form of the November 6 opinion creates puzzling ambiguities and procedural difficulties and may be misleading to litigants, the district court's interpretation of this opinion is not a clear abuse of discretion.

Characterizing the November 6 opinion as a final decision both on the merits and as an award of attorneys' fees has important jurisdictional consequences. Specifically, if the parties wished to challenge such a denial of attorneys' fees they had only two choices. They could appeal the decision within thirty days, Fed. R. App. P. 4(a)(1), or they could toll the time for appeal by filing a Rule 59(e) motion to alter or amend judgment within ten days, exclusive of weekends and holidays. None of the parties chose to appeal the November 6 order insofar as it pertained to attorneys' fees. The Hastert, Nieves, Chicago Urban League and Scott groups, however, did file a timely Rule 59(e) motion on November 14.[8] The district court denied this motion on January 17. The Hastert, Nieves, Scott and Chicago Urban League plaintiffs all filed timely no-

[8] Actually, these groups filed a motion to alter or amend judgment *and* a petition for attorneys' fees pursuant to section 1988. Ordinarily, such a petition for attorneys' fees would not be a proper Rule 59(e) motion. *White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 451 (1982). But because we have adopted the district court's view that it considered and denied attorneys' fees in its November 6 opinion, the later petition for such fees must be construed as a Rule 59(e) motion. Under our cases, all substantive motions served within ten days of the entry of judgment are treated as filed under Rule 59(e). *Charles v. Daley*, 799 F.2d 343, 347 (7th Cir. 1986). The petition for attorneys' fees was filed within ten days of the November 6 entry of judgment and it was substantive in the sense that it asked the district court to reverse its earlier denial of fees.

tices of appeal from this denial.[9] We thus have jurisdiction over their appeals.

The Rosebrook group, however, waited until December 24 to file a petition for attorneys' fees, well past the ten day limit for filing an appeal-delaying Rule 59(e) motion. The district court properly denied this petition as untimely.[10] The Rosebrook group may well have been misled by the terse nature of the district court's ruling on "fees" as we have indicated above. But, by deciding to honor the district court's characterization of its own order of November 6, we must correspondingly rule that the Rosebrook group was late. Those plaintiffs moved the district court to reconsider this motion. The court denied the motion to reconsider on January 21, and the Rosebrook plaintiffs filed a notice of appeal on February 18. We thus have jurisdiction over the Rosebrook's appeal only to the extent that it requests review of the district court's January 21 decision. Such review is, of course, exceedingly narrow. We are only permitted to consider whether the district court erred in denying the Rosebrook group's motion to reconsider the denial of a Rule 60(b) motion.

Thus having ascertained our jurisdiction, we now turn to the merits. Under 42 U.S.C. § 1973*l*(e), a court "in its discretion, may allow the prevailing party a reasonable

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[9] In addition to appealing to this court, the Hastert and Nieves plaintiffs also moved the district court to reconsider its January 17 decision. Since the district court has not resolved these motions, one might think that their appeals are premature. But successive requests to alter or amend judgment, which are all these motions amount to, do not toll the time for appeal, *United States Equal Employment Opportunity Comm'n. v. Gurnee Inns, Inc.*, 956 F.2d 146, 148 (7th Cir. 1992), nor do they affect the finality of the judgment. *Charles v. Daley*, 799 F.2d 343, 347 (7th Cir. 1986).

[10] Because the Rosebrook's petition for attorneys' fees was filed almost two months after the entry of judgment, it cannot be a Rule 59(e) motion. Under *United States v. Deutsch*, 981 F.2d 299, 301 (7th Cir. 1992), it must be construed as a motion for relief from judgment filed pursuant to Fed. R. Civ. P. 60(b).

attorney's fee" in an action, such as this one, "to enforce the voting guarantees of the fourteenth or fifteenth amendments." Pursuant to 42 U.S.C. § 1988, a court may make a similar award of fees to a "prevailing party" in a suit to enforce the provisions of 42 U.S.C. § 1983.[11] Although the statutes commit fee awards to the district court's discretion, Congress has nevertheless made clear that prevailing plaintiffs "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." S. Rep. 925, 94th Cong., 1st Sess. 40 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 807 (addressing § 1973*l*(e)); S. Rep. 1011, 94th Cong., 2d Sess. 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5912 (addressing § 1988). In any event, our analysis begins by determining which parties, if any, prevailed.

This is not ordinary litigation. Most notably, the underlying controversy in this case, i.e., the fight over the configuration of Illinois' new congressional districts, was not between the plaintiffs and the defendant. The State Board of Elections is truly a nominal defendant, completely disinterested in the outcome of that fight. The real dispute was between the various plaintiffs. Each had a plan to offer and the winner, at least from a lay person's perspective, is the litigant whose map the district court adopted. Conveniently, this common-sense understanding of winners and losers coincides in large part with the Supreme Court's definition of "prevailing party."

A party prevails, within the meaning of the fee-shifting statutes, "if [it] succeeds on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). We agree with the district court, that "the principal issue in litigation during these proceedings involved the

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[11] Because §§ 1973*l*(e) and 1988 contain nearly identical language and are driven by similar congressional purposes, we construe them similarly. *Cf. Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983).

determination of which proposed [congressional districting] plan for the entire State of Illinois best met constitutional and statutory criteria." 794 F. Supp. 259. On this score, the Hastert and Nieves groups are clear winners. The district court ultimately adopted the plan submitted by the Hastert plaintiffs, a plan which the Nieves plaintiffs formally adopted. *Id.* at 260. Thus, we find, as did the district court, that the Hastert and Nieves groups are "prevailing parties."

The district court concluded that the Scott and Chicago Urban League plaintiffs did not prevail. *Id.* at 259-60. We owe these decisions some discretion. *Shepard v. Sullivan*, 898 F.2d 1267, 1271 (7th Cir 1990). But when a district court overlooks, either intentionally or inadvertently, relevant, binding precedent, its decision cannot stand. In defining "prevailing party," the district court relied exclusively upon *Hensley v. Eckerhart*, 461 U.S. 424 (1983). Although *Hensley* is a central case interpreting the fee-shifting statutes, the Supreme Court has provided additional guidance. In particular, the Court in *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782, 790 (1989), rejected the so-called "central issue" test that several lower courts had adopted following *Hensley*. Under that test, a party was deemed to have prevailed only if he "prevailed *on the central issue* by acquiring the primary relief sought." *Id.* at 787 (citation omitted). In rejecting this formulation, the Court concluded that the degree of a plaintiff's success in relation to the other goals of the lawsuit was relevant only to the determination of the size of a reasonable fee, "not to eligibility for a fee award at all." *Id.* at 790. The court reiterated that success on *any* significant issue in litigation conferred prevailing party status. *Id.* at 791 (emphasis supplied).

The district court noted that the Scott plaintiffs intervened "for the limited purpose of addressing the configuration of a relatively small geographic area in the vicinity of East St. Louis, Illinois, contained in one of the pre-

trial *Hastert* plans." 794 F. Supp. at 259. The court went on to conclude that

> [p]laced in the context of arduous . . . proceedings conducted to review only redistricting plans for the entire state, the *Scott* [plaintiffs'] fleeting presence to address their concerns regarding a tiny fraction of the state, their neutral stance regarding the merits of the principal issue to be litigated and their absence from the trial proceedings compel the conclusion that they do not constitute a statutory prevailing party . . . ."

Id. (internal quotation marks omitted). Certainly, the district court is correct that, in terms of the entire redistricting process, the Scott plaintiffs' claims were not particularly expansive. Under the "central issue" test, they perhaps would not be entitled to fees. But the Supreme Court has rejected that analysis. We find that the configuration of any of Illinois' 20 congressional districts was a significant issue in the litigation, and, after *Garland*, success on any such issue is enough to trigger an award of fees. Under this standard, the Scott plaintiffs undoubtedly prevailed. They urged that the congressional districts encompassing East St. Louis be configured in a particular way. They convinced the Hastert group to incorporate their proposed configuration into the Hastert master plan. When the district court adopted the Hastert plan, the Scott group accomplished everything it set out to achieve.[12] Thus, they too prevailed.

The Chicago Urban League group, representing the purported interests of various African-American voters, sub-

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[12] It is of no consequence that the Scott group achieved its goals without litigating to the bitter end. Indeed, the Supreme Court has held that a party who achieves success by settling is entitled to attorney's fees. *Maher v. Gagne*, 448 U.S. 122, 129 (1980). All that is important is for the party to obtain the "substance of what [it] sought." *Hewitt v. Helms*, 482 U.S. 755, 761 (1987). The Scott plaintiffs undeniably did so.

mitted its own proposed minority district plan. It now claims to have been "at the forefront in both achieving settlement and in ensuring adoption of its [own] proposed configuration in the Hastert plan." Chicago Urban League's Br. at 11. These claims present close and difficult questions, and we will make several observations in attempting to determine their validity.

First, although some groups representing minority officials and voters, including the Scott group, did compromise and settle their differences with the Hastert group, *see* 777 F. Supp. 640, the Chicago Urban League plaintiffs did not. But, by remaining in the litigation with a position paralleling that of the Hastert plaintiffs, the Chicago Urban League group did help to bring about a settlement along those lines. Second, although the Chicago Urban League group's proposed minority districts "closely tracked" the Hastert plan's configuration for the same districts, the Chicago Urban League plaintiffs "chose to proceed on the basis of their own separate map." 794 F. Supp. at 260. The district court did not adopt the League's plan as such, but the plan adopted was certainly very close to that advocated by the League. Some might say that the League is in the position of a party that refused a generous settlement offer only to come up a bit short after the trial. But this point of view may place too much emphasis on a particular procedure, like formal settlement. On the other hand, congressional redistricting is a precise business, and battles often rage over slight changes in district boundaries. For example, in this litigation the Hastert group's (winning) plan contained a population deviation of 0.00017% while the Rosebrook group's (losing) plan contained a similar deviation of 0.00297%. 794 F. Supp. at 644. This case was ultimately fought along the margins. Moreover, the redistricting process is, at some level, a zero-sum affair, one plan is adopted and the rest are rejected. To the end, the Chicago Urban League plaintiffs insisted on their own map. They did not get it. On an issue like this, where either result would have been sustainable, the district court is in the best position to

determine whether fees are appropriate. Here, the district court did not abuse its discretion.

In sum, we agree with the district court that the Hastert and Nieves groups did prevail. We find, however, that the district court applied the wrong legal criteria in ascertaining the Scott plaintiffs' status. Measured by the correct standard, they too prevailed. As a result, the Hastert, Nieves and Scott groups are prima facie entitled to fees. We believe that the Chicago Urban League has a strong claim to entitlement. However, its insistence on its own map in formal opposition to the winning Hastert-Nieves map removes it sufficiently from complete "success" to support the district court's determination that it was not a prevailing party.

Our analysis does not end here, however, since the district court went on to find that the existence of "special circumstances" precluded an award of fees even to prevailing parties. Although the fee shifting statutes commit fee awards to a district court's discretion, such discretion is, as previously noted, quite narrow once prevailing party status has been determined. *See, e.g., New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 68 (1980). And we find that the reasons given by the district court for denying fees to prevailing parties in this case are inadequate.

The district court stated that "Congress' primary purpose in providing attorney's fees in civil rights litigation . . . was 'to eliminate financial barriers to the vindication of constitutional rights . . . .'" 794 F. Supp. at 260 (quoting *Seattle School District v. Washington*, 633 F.2d 1338, 1348 (9th Cir. 1980), *aff'd*, 458 U.S. 457 (1982)). The court went on to note that the plaintiffs in this case "do not appear to be drawn from the ranks of the disempowered and financially disadvantaged citizenry that Congress had in mind when enacting [fee-shifting statutes]." *Id.* The district court is wrong on this point for two reasons. First, despite the fact that certain of the plaintiffs in this matter were elected officials, there is no evidence that they were particularly wealthy. Second, and more important-

ly, the Supreme Court has consistently held that a plaintiff's ability to pay for legal representation is not a special circumstance justifying denial of attorneys' fees. *See, e.g., Venegas v. Mitchell*, 495 U.S. 82, 87-88 (1990); *Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989).

The district court also asserted that an award of fees would be unjust because "the plaintiffs merely shifted the legislative lobbying process that typically attends congressional redistricting to a federal judicial arena." 794 F. Supp. 261. This might be true, but it is hardly a reason to deny attorneys' fees. It is surely regrettable that the Illinois General Assembly was unable to enact a new congressional district scheme and that the taxpayers of the State of Illinois must now pay for their dereliction. But such is the case whenever the political branches of government fail to vindicate important rights and the affected parties must seek a judicial hearing. There can be no doubt, moreover, that fee awards may issue against state and local governments. *Hutto v. Finney*, 437 U.S. 678, 694 (1978). Thus, the State Board of Elections, as an agency of the state, may properly be held accountable for the prevailing parties' attorneys' fees.[13]

In reviewing these thorny fees matters in this redistricting case, we recognize the perhaps peculiar circumstances of redistricting cases generally. Here, all of the plaintiffs "contributed" to the final result in the sense that, by taking positions that were more or less, in whole or in part, "incorporated" into the accepted map, all parties arguably helped move the process forward toward its eventual culmination. On the other hand, there may be greater or

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[13] It is of no consequence that the State Board of Elections played no active role in the proceedings and agreed to enforce whatever plan the district court adopted, since fees may be taxed even against entities whose role is limited to enforcement of regulations they played no role in promulgating. *Crosby v. Bowling*, 683 F.2d 1068, 1073 (7th Cir. 1982). Nor is the Board's putative "good faith" a special circumstance justifying a refusal to award fees. *Lampher v. Zagel*, 755 F.2d 99, 104 (7th Cir. 1985).

lesser, formal or substantial, differences between the maps of the "winners" and the maps of the "losers." The Hastert, Nieves and Scott plaintiffs have been declared the winners because exactly what they advocated has been accepted. Although the presence of the Chicago Urban League undoubtedly contributed to the final result, the district court—with our reluctant approval—decided against these plaintiffs because the map sought was not precisely the one adopted.

The State Board of Elections, the nominal defendant, has no interest in the eventual outcome except that there *be* an outcome which it can implement. Yet the State Board may be held liable for fees to the prevailing parties plaintiff, whose status as such depends upon the *relative* success of their position in relation to the success of the other plaintiffs. These configurations of claim to liability and of success to failure are essentially unique to redistricting cases. In such cases, liability is usually imposed on a neutral (and nominal) defendant, and successful fees claims are awarded to the *relatively* successful plaintiffs. In this case, we are attempting to apply principles developed in a wide range of civil rights cases to the *sui generis* category of redistricting cases. As might be expected, these principles do not provide a close fit to this subject matter. It might be appropriate and helpful, by statute or otherwise, to develop a set of rules specifically governing attorneys' fees in redistricting cases, but that is not our task here.

Finally, we turn to the Rosebrook plaintiffs' appeal. If we were to address this group's claims on the merits, it might be a close call, since the pro's and con's are similar to the factors affecting the Chicago Urban League plaintiffs (although the Rosebrook's map, overall, is in marked contrast to the winning Hastert map). But we cannot address the merits of the Rosebrook plaintiffs' claim since they filed their petition for fees late. We have acceded to the district court's conclusion that its November 6, 1991, decision addressed attorneys' fees. Under *United States*

v. Deutsch, 981 F.2d 299, 301 (7th Cir. 1992), substantive motions filed more than ten days after entry of final judgment are construed as motions filed under Federal Rule of Civil Procedure 60(b). The Rosebrook plaintiffs did not file their petition for fees until December 24, 1991, considerably more than ten days after the entry of final judgment on the fees issue. As a result, we construe their petition as a Rule 60(b) motion, or, more precisely, as an attempted Rule 60(b) motion.

The bases for relief specified in Rule 60(b) are indeed broad, encompassing "any . . . reason justifying relief from the operation of the judgment." We warned in *Deutsch*, however, that parties should not expect to use the principle announced there as "a Trojan horse for sneaking what are actually tardy Rule 59(e) motions into the courtroom under the guise of Rule 60(b)." 981 F.2d at 302. The Rosebrook plaintiffs' petition for fees can reasonably be considered as nothing other than a belated Rule 59(e) motion. The district court thus properly denied it as untimely in the first instance and did not abuse its discretion in refusing to reverse that decision upon the Rosebrook group's motion for reconsideration.

For the foregoing reasons, we REVERSE the judgment of the district court insofar as it held that the Scott group is not a prevailing party. We also REVERSE the district court's determination that special circumstances exist so as to preclude the award of attorneys' fees to prevailing parties. We AFFIRM the district court's judgment that the Hastert and Nieves plaintiffs are prevailing parties and that the Chicago Urban League plaintiffs are not prevailing parties. We also AFFIRM the court's denial of the Rosebrook group's petition for fees as untimely filed. Finally, we REMAND the case with instructions to award reasonable attorneys' fees to the prevailing parties.

AFFIRMED IN PART, REVERSED IN PART
AND REMANDED WITH INSTRUCTIONS

COFFEY, *Circuit Judge*, dissenting. I concur with the majority opinion on the issue of which parties prevailed in the litigation, i.e., the Hastert plaintiffs, the Nieves plaintiffs and the Scott plaintiffs, however, I am of the opinion that the district court did not abuse its discretion in denying fees to the prevailing parties because of the presence of special circumstances. *See Hastert v. State Bd. of Elections*, 794 F. Supp. 254, 260-61 (N.D. Ill. 1992). It is well-settled that prevailing parties "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Hensley v. Eckerhart*, 461 U.S. 424, 429, 103 S. Ct. 1933, 1937 (1983) (quoting S. Rep. No. 94-1011, 2d Sess. 4, *in* 1976 U.S.C.C.A.N. 5908, 5912 (quoting *Neuman v. Piggie Park Enterprise*, 390 U.S. 400, 402, 88 S. Ct. 964, 966 (1968))). Congress clearly provided this exception for special circumstances because it was cognizant that an award of attorneys' fees is not always warranted. *See* S. Rep. No. 94-1011 at 1 *in* 1976 U.S.C.C.A.N. at 5909 (declaring the purpose of the Attorney's Fees Awards Act as "giv[ing] the Federal courts discretion to award attorneys' fees to prevailing parties in suits brought to enforce the civil rights acts . . ."); *see also Seattle School Dist. v. Washington*, 633 F.2d 1338, 1348 (9th Cir. 1980), *aff'd* 458 U.S. 457, 102 S. Ct. 3187 (1982) (special circumstances render an award unjust when "allowing attorney's fees in a particular case would [not] further the congressional purpose in adopting the [fee] Acts" or when an award is contrary to "the balance of the equities").

I agree with the majority that both the indigent civil rights plaintiff and the civil rights plaintiff who has the financial means to afford legal representation are entitled to attorneys' fees, *see, e.g., Venegas v. Mitchell*, 495 U.S. 82, 87-88 (1990), and thus it would be inappropriate to deny attorneys' fees to the prevailing plaintiffs in this action merely because they may have some economic means. However, it is evident that the three-judge district court panel denied the attorneys' fees in part because of the "balance of the equities," *Seattle School Dist.*, 633 F.2d

at 1348, and not simply because the plaintiffs were not "drawn from the ranks of the disempowered and financially disadvantaged." *Hastert*, 794 F. Supp. at 260-61.

In regard to the balance of the equities, my primary concern is that if parties can obtain attorneys' fees under the particular set of facts in this case then we are inviting future plaintiffs to stonewall during the legislative redistricting process and once the deadline for the legislature to adopt a redistricting plan passes, the parties may shift the debate into the federal court arena where they will be entitled to attorneys' fees. The majority dismisses this concern by stating that the fee award is justified because of the legislature's "dereliction," i.e., the political branch of government failed to pass redistricting legislation before the statutory deadline. We are hardly in a position to make an assessment of this factual situation for we have before us neither a record of the legislative hearings nor any live witnesses much less a tape of the proceedings. Thus, while it is obvious that fee awards may issue against state governments, *e.g. Hutto v. Finney*, 437 U.S. 678, 694 (1978), it is far from obvious that such an award is mandated in the case before us.

The posture of this case dictates that we deny the prevailing parties attorneys' fees. If this case had remained in the legislative forum the parties would not be entitled to attorneys' fees. The only reason they now qualify for an award of attorneys' fees is because the legislature, possibly due to a lack of leadership or many and/or sundry other potential reasons, failed to draft a redistricting plan within the statutorily imposed deadline. Significantly, we have no knowledge of what role the prevailing parties played if any in preventing the legislature from adopting a redistricting plan prior to the deadline. The plaintiffs might have interfered with the legislative process through stonewalling the legislature from timely passing a redistricting plan. Thus, I am of the opinion that neither the purpose of the fee-shifting statute nor the balance of the equities favors a grant of attorneys' fees.

In addition, and perhaps most importantly, it is evident that throughout the redistricting process the State Board of Elections at all times made it eminently clear that it was willing to conduct the 1992 congressional elections according to whatever plan was adopted. The Board's unqualified acquiescence is proof that the State was not actively involved in denying the plaintiffs' voting rights and thus the State of Illinois through its Board of Elections should not be penalized and ordered to pay the plaintiffs' legal fees. This must not be read to indicate that prevailing parties are not entitled to attorneys' fees in any redistricting cases, but under this particular set of facts, where there was a complete lack of adversarial activity on the part of the State Board of Elections, I am convinced that attorneys' fees should be denied as a special circumstance.

Because the majority is intent on awarding attorneys' fees, I can only suggest to the district court that on remand they heed to the Third Circuit case of *Daggett v. Kimmelman*, 864 F.2d 1122 (3d Cir. 1989), which contains a thorough and thoughtful analysis on what constitutes reasonable attorneys' fees. *Daggett* prohibits plaintiffs from receiving attorneys' fees for "time spent on political considerations, even if interwoven with services that are compensable." *Id.* at 1128. Additionally, in *Daggett*, the court was unwilling to accept prevailing parties attorneys' affidavits as proof positive of reasonable fees. The court of appeals directed the trial court to make an inquiring search into the billable hours to assure that "the New Jersey taxpayers, would not be required to pay fees for anything other than the time reasonably spent to devise a constitutional plan." *Id.* at 1127. Because of the holding in the majority opinion, the district court will be required to conduct a fact finding hearing to determine what, if any, attorneys' fees are compensable. I would encourage the trial court to make an in-depth inquiry into the award of attorneys' fees to assure that they are not recompensed for time that was commingled with political considerations because fee shifting in civil rights litigation is not meant

to produce a "windfall" for attorneys. *Farrar v. Hobby*, 113 S. Ct. 566, 575 (1992).

For the reasons stated herein, I respectfully DISSENT.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case Number: 91 C 4028 (Consolidated)

Date: January 17, 1992

Name of Assigned Judge: KANNE/NORGLE/CONLON

Case Title: Dennis J. Hastert, et al. v.
State Board of Elections, et al.

MOTION: Plaintiffs' Motions to Amend or Alter Judgment

DOCKET ENTRY:

* * * * * *

(10) ☒ [Other docket entry]

Plaintiffs' Fed.R.Civ.P. 59(e) motions to amend or alter judgment to permit an award of attorney's fees is denied. The costs of notice of publication ordered by this court on July 31, 1991 shall be divided equally among the *Hastert*, *Nieves*, *Rosebrook* and *Collins* plaintiffs.
ENTER MEMORANDUM OPINION AND ORDER.

/s/ SUZANNE B. CONLON

(11) ☒ [For further detail see ☒ order attached to the original minute order form.]

* * * * * *

[Dated January 17, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Consolidated Cases

DENNIS J. HASTERT, HARRIS FAWELL, JOHN E. PORTER, PHILIP M. CRANE, HENRY J. HYDE, AND ROBERT H. MICHEL,

Plaintiffs,

No. 91 C 4028 v.

STATE BOARD OF ELECTIONS, JOHN J. LANIGAN, THERESA M. PETRONE, RICHARD A. COWEN, LAWRENCE E. JOHNSON, DAVID E. MURRAY, LANGDON D. NEAL, WANDA L. REDNOUR, AND HANNELORE HUISMAN,

Defendants.

WILFREDO NIEVES, AL JOHNSON, LINDA D. CORONADO, BOBBY RUSH, JESUS GARCIA, REV. WILLIE BARROW, RAFAEL BORIA, MIGUEL DEL VALLE, ROBERT L. LUCAS, LEON D. FINNEY, JR., REV. CLAY EVANS, JOSEPH GARDNER, LUIS V. GUTIERREZ, REGNER SUAREZ, JOSEPH BERRIOS, MIGUEL A. SANTIAGO, NEOMI HERNANDEZ,

Plaintiffs,

No. 91 C 4154 v.

ILLINOIS STATE BOARD OF ELECTION COMMISSIONERS, JOHN J. LANIGAN, THERESA M. PETRONE, RICHARD A. COWEN, HANNELORE HUISMAN, LAWRENCE E. JOHNSON, DAVID E. MURRAY, LANGDON D. NEAL, AND WANDA J. REDNOUR,

Defendants.

CARDISS COLLINS, CHARLES HAYES, REV. WILBUR N. DANIELS, REV. CLAUDE S. WYATT, HOWARD B. BROOKINS, DONALD L. WILLIAMS, PERCY GILES, AND RICKY HENDON,

Plaintiffs,

No. 91 C 4643 v.

STATE BOARD OF ELECTIONS, JOHN J. LANIGAN, THERESA M. PETRONE, RICHARD A. COWEN, JOHN P. DAILEY, LAWRENCE E. JOHNSON, DAVID E. MURRAY, LANGDON D. NEAL, AND WANDA REDNOUR,

Defendants.

ANN ROSEBROOK, DARYL BARKLOW, AMIEL CUETO, RICHARD MARK, JEANELLE NORMAN, CAROLYN TONEY, LEE BABCOCK, RAYMOND OLIVER, BARBARA POSHARD, WILLIAM MATHEWS, GERALD HAWKINS, AND EVA SAVALA,

Plaintiffs,

No. 91 C 4656 v.

STATE BOARD OF ELECTIONS, JOHN J. LANIGAN, THERESA M. PETRONE, RICHARD A. COWEN, LAWRENCE E. JOHNSON, DAVID E. MURRAY, LANGDON D. NEAL, WANDA L. REDNOUR, AND HANNELORE HUISMAN,

Defendants.

THE CHICAGO URBAN LEAGUE, CRAIG R. COLLINS, MARK ALLEN, AND NIKOLAS C. THEODORE,

Plaintiffs,

No. 91 C 5472 v.

STATE BOARD OF ELECTIONS, JOHN J. LANIGAN, THERESA M. PETRONE, RICHARD A. COWEN, JOHN P. DAILEY, LAWRENCE E. JOHNSON, DAVID E. MURRAY, LANGDON D. NEAL, AND WANDA L. REDNOUR,

Defendants.

MEMORANDUM OPINION AND ORDER

Before KANNE, Circuit Judge, NORGLE, District Judge, and CONLON, District Judge.

Per Curiam. Various plaintiffs and intervenors in this consolidated action regarding the remapping of Illinois congressional districts following the 1990 census now move pursuant to Fed. R. Civ. P. 59(e) to modify judgment to permit the awarding of attorneys' fees and costs under 42 U.S.C. §§ 1973*l*(e) and 1988.

BACKGROUND

On November 7, 1991, final judgment was entered in these consolidated cases. *Hastert v. State Board of Elections*, No. 91 C 4028, slip op. (November 7, 1991). Judgment was entered in favor of the *Hastert*, *Nieves*, *Collins*, *Rosebrook*, and *Chicago Urban League* plaintiffs to the extent those parties requested that the then-existing Illinois congressional district plan be declared null and void. *Id.* slip op. at 64. Although each of the parties named the Illinois State Board of Elections and its members as the sole defendants in the separately filed actions, the Board did not possess the authority to provide plaintiffs with the relief they sought. Additionally, the Board did not dispute plaintiffs' contentions that population changes represented in the 1990 census rendered unconstitutional the existing congressional district plan implemented by federal court order following the 1980 census. *See In re Congressional Dist. Reapportionment Cases*, No. 81 C 3915, slip op. (N.D. Ill. Nov. 23, 1981). However, because the Board of Elections remained bound to implement the terms of the federal court order that had created the outmoded congressional district plan, the Board remained a necessary party to

the present actions. The Board thus served only as a nominal party and played no active role in the proceedings.

The adversarial circumstances requiring trial before this three-judge district court panel arose solely from competing redistricting plans submitted by the plaintiffs themselves. Thus, this court served as the arena for the principally legislative task of redrawing Illinois' congressional districts. Only two statewide redistricting plans, the so-called *Hastert* and *Rosebrook* plans, were placed in evidence before the court during the two-day trial held in early October 1991. The court ultimately ordered the adoption of the *Hastert* plan to govern Illinois congressional elections until Illinois congressional districts are otherwise reapportioned in accordance with law. *Hastert*, slip op. at 65. The court also directed that "all parties to these consolidated cases shall bear their own costs." November 6, 1991 Memorandum Opinion and Order at 66.

On November 20, 1991, the *Hastert*, *Nieves* and *Chicago Urban League* plaintiffs and Scott intervenors moved pursuant to Fed. R. Civ. P. 59(e) to modify the judgment and requested that the court award them fees and costs as prevailing parties under 42 U.S.C. §§ 1973*l*(e) and 1988. The *Collins* plaintiffs filed a similar motion on November 21, 1991. On November 27, 1991, the *Harold Washington Party/Savage* intervenors separately moved to become additonal parties to the *Hastert* motion to modify judgment.

DISCUSSION

Various plaintiffs and intervenors move pursuant to Fed. R. Civ. P. 59(e) to amend the November 7, 1991 judgment of the court to permit the award of attorney's fees

under 42 U.S.C. §§ 1973*l*(e) and 1988. Ordinarily, a request for fees is a collateral issue to the main cause of action. *See White v. New Hampshire Dep't of Employment Security*, 455 U.S. 445, 451 (1982). However, this court's express order directing the parties to bear their own costs means that plaintiffs' requests for fees necessarily constitute a Rule 59(e) motion to alter or amend judgment. To be valid, a Rule 59(e) motion must be served "not later than 10 days after entry of the judgment." Fed. R. Civ. P. 59(e). The *Harold Washington Party/Savage* intervenors moved to join the present Rule 59(e) motions on the thirteenth working day, exclusive of weekends and holidays, after entry of judgment. Accordingly, the motion of the *Harold Washington Party/Savage* plaintiffs is denied as untimely. The court does have jurisdiction over the timely-filed Rule 59(e) motions of the remaining moving plaintiffs.

Under 42 U.S.C. § 1973*l*(e), a court "in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of costs" in "any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment." 42 U.S.C. § 1973*l*(e). Under 42 U.S.C. § 1988, which was patterned in part upon the fee provision contained in § 1973*l*(e), *see Hanrahan v. Hampton*, 446 U.S. 754, 758, n.4 (1980), a court may permit a similar award to a "prevailing party" in a suit to enforce the provisions of 42 U.S.C. § 1983. 42 U.S.C. § 1988. In enacting both of these statutes, Congress directed that prevailing parties "should ordinarily recover an attorney's fees unless special circumstances would render such an award unjust." S. Rep. 925, 94th Cong., 1st Sess. 40 (1975), *reprinted in* 1975 U.S. Code Cong. & Admin. News 774, 807 (citation omitted) (addressing § 1973*l*(e)) ("S. Rep. 925"); S. Rep. 1011, 94th Cong., 2d Sess. 4 (1976), *re-*

printed in 1976 U.S. Code Cong. & Admin. News 5908, 5912 (citation omitted) addressing § 1988) ("S. Rep. 1101"). *See also Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (citation omitted).[1]

The first question to be answered in considering plaintiffs' motions is whether the various movants are prevailing parties within the meaning of the fee statutes. " '[P]laintiffs may be considered "prevailing parties" for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.' " *Hensley*, 461 U.S. at 433, quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978). All of the movants contend that they prevailed on what they characterize as the significant issue of the unconstitutionality of the 1981 congressional districting plan due to population changes reflected in the 1990 census.

The moving plaintiffs are correct only in the technical sense that this court declared the previous congressional districts null and void. However, the issue of the constitutionality of the previous congressional districts was never in dispute. Indeed, after filing their respective complaints, none of the plaintiffs offered more than a passing reference to this subject; the unconstitutionality of the 1981 plan was dispensed with in a perfunctory footnote in the court's memorandum opinion. *See Hastert*, slip op. at 14 n.7. Fee claims cannot be reasonably justified on this basis. Thus, we turn to the various alternative arguments offered by the respective plaintiffs.

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[1] Because §§ 1973*l*(e) and 1988 contain nearly identical language and are driven by similar congressional purposes, courts construe the two statutes similarly. *See e.g., Kirksey v. Danks*, 608 F. Supp. 1448, 1452 (S.D. Miss. 1985); *cf. Hensley v. Eckerhart*, 461 U.S. at 433 n.7.

The principal issue in litigation during these proceedings involved the determination of which proposed plan for the entire State of Illinois best met constitutional and statutory criteria. All parties agreed that the new congressional district map should contain four minority districts—one Hispanic and three African-American super-majority districts. However, no prior Illinois congressional district map had contained an Hispanic super-majority congressional district. The creation of a super-majority district for the Hispanic "language minority" community residing in the Chicago area therefore required special consideration despite the agreement among the parties. Thus, the determination of an Hispanic super-majority district is also properly viewed as a significant issue in litigation.

The *Collins* plaintiffs assert prevailing party status in part because the configuration of the First and Seventh Congressional Districts contained in the *Hastert* plan adopted by the court closely approximated the configuration of those same districts advanced by the *Collins* plaintiffs. This assertion entirely disregards the fact that the *Collins* plaintiffs ultimately adopted the *losing* plan advanced by the *Rosebrook* plaintiffs. Moreover, the *Collins* plaintiffs devoted their efforts at trial exclusively to the issue of the placement of the small geographical area comprising Chicago's Second Ward. Not only were the *Collins* plaintiffs' arguments on this issue ultimately rejected, but they also were found to be tangential to the proper scope of the court's inquiry. *Hastert*, slip op. at 64. The *Collins* plaintiffs therefore do not constitute a "prevailing party" for the purposes of §§ 1973*l*(e) and 1988.

The *Scott* intervenors introduced themselves to these proceedings on September 30, 1991, just over a week be-

fore trial, for the limited purpose of addressing the configuration of a relatively small geographic area in the vicinity of East St. Louis, Illinois, contained in one of the pre-trial *Hastert* plans. The *Scott* intervenors had barely finished introducing themselves to these proceedings when they stated at the October 3, 1991 pre-trial conference that they had reached an accommodation with the *Hastert* plaintiffs. The *Scott* intervenors further stated that they would neither participate in these subsequent proceedings nor would they formally endorse or object to the plans to be offered in evidence at trial. Placed in the context of arduous and complicated expedited proceedings conducted to review only redistricting plans for the entire state, the *Scott* intervenors' fleeting presence to address their concerns regarding a tiny fraction of the state, their neutral stance regarding the merits of the principal issue to be litigated and their absence from the trial proceedings compel the conclusion that they do not constitute a statutory "prevailing party" with respect to a "significant issue in litigation." *Hensley*, 461 U.S. at 433.

The *Chicago Urban League* plaintiffs, like the *Collins* plaintiffs and *Scott* intervenors, focused their attention on a small portion of the state. In addition to seeking the perfunctory declaration voiding and nullifying the 1981 congressional districts, the *Chicago Urban League* plaintiffs sought implementation of their own proposed plan for the four minority districts. The *Chicago Urban League* plan closely tracked the *Hastert* configuration of the minority districts. However, similarities to the final *Hastert* plan notwithstanding, the *Chicago Urban League* plaintiffs chose to proceed on the basis of their own separate map. Moreover, the *Chicago Urban League* did not address the merits of their proposal within the larger context of the adoption of a new state-wide plan, the prin-

cipal issue before the court. Thus, although the court characterized the *Chicago Urban League* map as effectively adopting the *Hastert* configuration of certain African-American super-majority districts, *see Hastert*, slip op. at 62, the court did not adopt the separate *Chicago Urban League* plan. Therefore, the *Chicago Urban League* plaintiffs are not a "prevailing party" on any significant issue.

The remaining movants, the *Hastert* and *Nieves* plaintiffs, are "prevailing parties" for purposes of § 1973*l*(e) and 1988. This court ultimately adopted the congressional district plan submitted by the *Hastert* plaintiffs. The *Nieves* plaintiffs formally adopted the *Hastert* plan and clearly played a critical role in its development. Indeed, the pre-trial activities of both the *Hastert* and *Rosebrook* plaintiffs involved attempts to satisfy the *Nieves* plaintiffs' goal of establishing Illinois' first Hispanic super-majority district. Additionally, the *Nieves* plaintiffs provided the only truly substantive evidence and legal analysis regarding the establishment of an Hispanic super-majority district. Thus, the adoption of the *Hastert* plan rendered both the *Hastert* and *Nieves* plaintiffs prevailing parties on the significant issues in litigation.

As noted above, prevailing parties should ordinarily recover fees except where "special circumstances" would render a fee award "unjust." *Hensley*, 461 U.S. at 429. Two factors have been considered in determining "if a case involves 'special circumstances' that would make an award 'unjust': (1) whether allowing attorney's fees in a particular case would further the congressional purpose in adopting the [fee] Acts, and (2) the balance of the equities." *Seattle School Dist. v. Washington*, 633 F.2d 1338, 1348 (9th Cir. 1980) (citations omitted), *aff'd*, 458 U.S. 457 (1982).

The principal congressional purpose behind the enactment of the attorneys' fees provision of §§ 1973*l*(e) and 1988 is reflected in Congress' observation that "[i]n many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer." S. Rep. 1011 at 2, *reprinted in* 1976 U.S. Code Cong. & Admin. News at 5910; *see also* S. Rep. 925 at 43 & n.47, *reprinted in* 1975 U.S. Code Cong. & Admin. News at 809-10. As a result, fee awards are often "an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies" embodied in civil rights legislation. *Id.*; *see also* S. Rep. 925 at 41, *reprinted in* 1975 U.S. Code Cong. & Admin. News at 808. Congress' primary purpose in providing attorney's fees in civil rights litigation, therefore, was "to eliminate financial barriers to the vindication of constitutional rights" and thereby "stimulate voluntary compliance with the law." *Seattle School Dist.*, 633 F.2d at 1348 (citation omitted). Awarding fees to the *Hastert* and *Nieves* plaintiffs would not advance this congressional purpose.

The *Hastert* plaintiffs collectively comprise the entire Republican Party contingent of the current Illinois congressional delegation. The *Nieves* plaintiffs include in their ranks two Chicago aldermen, an Illinois state senator and other community leaders. Plaintiffs therefore do not appear to be drawn from the ranks of the disempowered and financially disadvantaged citizenry that Congress had in mind when enacting §§ 1973*l*(e) and 1988. The same observation applies to various other plaintiffs in these consolidated proceedings. For instance, the principal *Collins* plaintiffs are two Democratic Party members of the Illinois congressional delegation. Additionally, it appeared that the *Rosebrook* plaintiffs acted as nominal plaintiffs

on behalf of the Democratic Party and various other Democratic members of the current Illinois congressional delegation.

The identity of the plaintiffs in this consolidated action, particularly the principal plaintiffs, suggests that plaintiffs merely shifted the legislative lobbying process that typically attends congressional redistricting to a federal judicial arena. To the extent this move was necessary, blame must be traced in part to the unwillingness of many of the parties to this action, in addition to their state legislative counterparts, to grapple with the issue of congressional redistricting in its intended arena, the state legislature. The present action did not involve a review of the constitutionality of a state-endorsed plan. Instead, the real issues in dispute involved arguments over how Illinois' congressional district lines should be drawn. That issue often involved parochial interests and partisan political concerns that are typically legislative matters.

Plaintiffs would have had to bear their own costs had they fully pursued the redistricting process in the state legislature. It would be inequitable to shift the burden of bearing the costs for plaintiffs' lobbying efforts to the State of Illinois *and thus the taxpayers* merely because the parties moved the pursuit of their political interests to a federal court under the civil rights laws. Accordingly, the balance of equities presents special circumstances warranting a denial of a fee award.

These observations are not meant to detract from the admirable efforts undertaken by the various plaintiffs once the issue of congressional redistricting was moved to this forum. We merely point out the consequences of the Illinois legislature's failure to formulate congressional redistricting plans over the years. *See Hastert*, slip op. at 13 & n.6. The admirable work of the parties in the present

action more appropriately should have been carried out in the halls of the state legislature. The prevailing parties should not now receive a fee award for expenses that they would not have been able to recoup had they resolved their differences in the legislative forum.

One final administrative matter requires our attention. On July 31, 1991, the court ordered the immediate publication of notice of these proceedings in daily newspapers around the State of Illinois. The published notice invited participation by any interested group or individual. At the time the court issued its order, the *Hastert* and *Nieves* actions had been filed and consolidated. The *Rosebrook* and *Collins* plaintiffs had filed their separate related actions, with consolidation following soon after. To achieve immediate compliance with the court's notice order, the *Hastert* plaintiffs undertook the administrative and financial burden of publishing the required notice. The *Hastert* plaintiffs now seek partial reimbursement for the costs of the necessary courtesy it extended to the other plaintiffs. The costs of the required notice should be divided equally among the *Hastert, Nieves, Rosebrook* and *Collins* parties. Publication of notice was ordered to advance the disposition of the claims of these plaintiffs who had filed the only claims at the time notice of publication was ordered.

CONCLUSION

Plaintiffs' Fed. R. Civ. P. 59(e) motions to amend or alter judgment to permit an award of attorney's fees is denied. The costs of notice of publication ordered by this court on July 31, 1991 shall be divided equally among the *Hastert, Nieves, Rosebrook* and *Collins* plaintiffs.

January 17, 1992

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case Number: 91 C 4028 Date: January 21, 1992

Name of Assigned Judge: SUZANNE B. CONLON

Case Title: HASTERT et al -v- STATE BOARD OF ELECTIONS et al

* * * * * *

DOCKET ENTRY:

* * * * * *

(10) ☒ [Other docket entry] The Rosebrook plaintiffs' motion to reconsider is denied as moot. *See* memorandum opinion and order dated January 17, 1992.

/s/ SUZANNE B. CONLON

* * * * * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 91 C 4028 Date: January 7, 1992

Name of Assigned Judge: Judge Suzanne Conlon

Case Title: Dennis J. Hastert v. State Board of Elections, et al.

MOTION: Plaintiff, Rosebrook's Motion for Leave to File Their Petition for Attorney's Fees and Expenses and Supporting Brief Pursuant to Local Rule 46

DOCKET ENTRY:

* * * * * *

(2) ☒ [Other docket entry:]

Motion is denied as untimely.

/s/ SUZANNE B. CONLON

* * * * * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case Number: 91 C 4028 Date: December 27, 1991

Name of Assigned Judge: Suzanne B. Conlon

Case Title: Dennis J. Hastert, et al. v.
State Board of Elections

MOTION: Rosebrook Plaintiffs' Motion to Alter or Amend Judgment

DOCKET ENTRY:

* * * * * *

(10) ☒ [Other docket entry]

The *Rosebrook* plaintiffs' motion to alter or amend judgment is denied as moot. *See Hastert, et al. v. State Board of Elections*, 91 C 4028, Memorandum Opinion and Order of November 6, 1991 at 37 ("The difference between the two plans is minimal" with respect to the proposed Hispanic districts).

/s/ SUZANNE B. CONLON

* * * * * *

Supreme Court, U.S.
FILED
OCT 7 1994
OFFICE OF THE CLERK

No. 94-457

In The

Supreme Court of the United States

October Term, 1994

ILLINOIS STATE BOARD OF ELECTIONS, *et al.*,

Petitioners,

v.

DENNIS J. HASTERT, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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No. 94-457

In The

Supreme Court of the United States

October Term, 1994

ILLINOIS STATE BOARD OF ELECTIONS, *et al.*,

Petitioners,

v.

DENNIS J. HASTERT, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

Respondents Dennis J. Hastert, Harris Fawell, John E. Porter, Philip M. Crane, Henry J. Hyde, Thomas W. Ewing and Robert H. Michel (hereinafter referred to together as "Respondents" or the "Hastert plaintiffs"), submit this brief in opposition to the petition for a writ of certiorari in this case.[1]

[1] The "Nieves Hispanic plaintiffs," represented in this matter by the Mexican-American Legal Defense and Education Fund, join in this Brief in Opposition.

OPINIONS BELOW

The opinion of the court of appeals (*Pet. App.* 1-29) is reported at 28 F.3d 1430. The memorandum opinion and order of the three-judge district court denying attorneys' fees (*Pet. App.* 55-66) is reported at 794 F. Supp. 254.

JURISDICTION

The original judgment of the court of appeals was entered on December 17, 1993. *Pet. App.* 32. The court of appeals granted rehearing and issued an amended opinion and order on June 1, 1994. *Id.* at 4. By order dated August 29, 1994 Justice Stevens extended the time for filing the petition for certiorari up to and including September 7, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

The issue in this case is whether the federal courts have the authority under two fee-shifting statutes – 42 U.S.C. § 1973*l*(e) and 42 U.S.C. § 1988 – to award attorneys' fees against a nominal state defendant when the state legislature fails to redraw congressional districts as required following a decennial census. The Seventh Circuit, following the decisions of every other court of appeals to consider the issue, held that fees could be awarded against the state defendant. *Pet. App.* 23 & n.16. The court of appeals also held that under the particular

facts of this case, no "special circumstances" existed warranting denial of fees. *Id.* at 22-24. No "special and important reasons" (Sup: Ct. R. 10.1) exist that would justify review of this routine and fact-bound attorneys' fees decision.

1. As a result of the 1990 census, the number of congressional seats apportioned to Illinois decreased from 22 to 20. Under state law, the Illinois legislature was required to develop a congressional redistricting plan by June 30, 1991, but failed to do so. On June 27, 1991 – after it became apparent that the legislature was not going to adopt a redistricting plan before recessing for the summer – the Hastert plaintiffs filed an action seeking: (1) a declaration that the congressional districting plan then in place was unconstitutional; (2) an injunction prohibiting the Illinois State Board of Elections (the "State Board") from conducting the 1992 elections using the existing districts; and (3) a declaration that the statewide redistricting plan that they had prepared be put into effect. *Pet. App.* 5-6.

The Hastert plaintiffs are the Republican Party members of the Illinois congressional delegation. Several other parties subsequently filed similar lawsuits: a group of Hispanic and African-American voters (the "Nieves plaintiffs"); a group acting on behalf of the Democratic Party members of Congress (the "Rosebrook plaintiffs"); a group of voters represented by the Chicago Urban League (the "Chicago Urban League plaintiffs"); U.S. Representatives Cardiss Collins and Charles Hayes and voters from their districts (the "Collins plaintiffs"); and a group affiliated with local NAACP chapters (the "Scott

plaintiffs"). *Pet. App.* 5-7. All of the lawsuits were consolidated with the Hastert action. The Hastert and Nieves plaintiffs joined together to support a single statewide redistricting map. The Scott and Chicago Urban League plaintiffs were interested only in a relatively small portion of the state map, but they also came to support the Hastert plan. *Id.* at 15-19. The Rosebrook and Collins plaintiffs supported a different redistricting plan. *Id.* at 20-22.

2. The three-judge district court issued its decision on the merits on November 6, 1991, adopting the Hastert plan. *Pet. App.* 7. At the very end of its opinion, the court ordered that "all parties to these consolidated cases bear their own costs." 777 F. Supp. at 662. The Hastert, Nieves, Chicago Urban League and Scott plaintiffs filed timely Rule 59(e) motions to alter or amend the judgment, asking the court to award them attorneys' fees against the State Board. The district court denied those motions on January 17, 1992. *Pet. App.* 55-66.

The court held that the Hastert and Nieves plaintiffs were prevailing parties and thus would ordinarily be eligible for fees:

> This court ultimately adopted the congressional district plan submitted by the *Hastert* plaintiffs. The *Nieves* plaintiffs formally adopted the *Hastert* plan and clearly played a critical role in its development. * * * Thus, the adoption of the *Hastert* plan rendered both the *Hastert* and *Nieves* plaintiffs prevailing parties on the significant issues in litigation.

Pet. App. 63. The court held that the Collins, Rosebrook, Scott and Chicago Urban League plaintiffs were not prevailing parties. *Id.* at 61-63.

Even though it held that the Hastert and Nieves plaintiffs were prevailing parties, the district court denied their applications for fees. *Pet. App.* 63-66. The court found that two "special circumstances" existed that would render a fees award unjust: (1) the Hastert and Nieves plaintiffs, as elected officials and community leaders, "do not appear to be drawn from the ranks of the disempowered and financially disadvantaged citizenry that Congress had in mind when enacting §§ 1973*l*(e) and 1988" (*Id.* at 64); and (2) the plaintiffs "shifted" the redistricting dispute to the federal courts and away from the state legislature, where they would have had to bear their own costs. *Id.* at 65. In concluding that the prevailing plaintiffs were not entitled to attorneys' fees, the district court did not rely upon or discuss the status of the State Board as a nominal defendant.

3. The Seventh Circuit reversed. The court of appeals held that the Hastert and Nieves plaintiffs, the groups the district court held to be "prevailing parties," were entitled to attorneys' fees. *Pet. App.* 22-24. The court also held that the Scott and Chicago Urban League plaintiffs were prevailing parties and were entitled to fees. *Id.* at 16-21.

The Seventh Circuit rejected the district court's assertion that fees should be denied because the plaintiffs were not "drawn from the ranks of the disempowered and financially disadvantaged citizenry that Congress had in mind when enacting § 1973*l*(e) and 1988":

> The district court is wrong on this point for two reasons. First, despite the fact that certain of the plaintiffs in this matter were elected officials, there is no evidence that they were particularly wealthy. Second, and more importantly, the Supreme Court has consistently held that a plaintiff's ability to pay for legal representation is not a special circumstance justifying denial of attorneys' fees. See, *e.g.*, *Venegas* v. *Mitchell*, 495 U.S. 82, 87-88 (1990); *Blanchard* v. *Bergeron*, 489 U.S. 87, 94 (1989).

Id. at 22-23. The court of appeals also disagreed with the district court's holding that fees should be denied because the plaintiffs shifted the dispute from the state legislature to the federal courts:

> This * * * is hardly a reason to deny attorneys' fees. It is surely regrettable that the Illinois General Assembly was unable to enact a new congressional district scheme and that the taxpayers of the State of Illinois must now pay for their dereliction. But such is the case whenever the political branches of government fail to vindicate important rights and the affected parties must seek a judicial hearing.

Id. at 23.

In one sentence of a footnote, the Seventh Circuit rejected the State Board's argument that fees should not be assessed against it because it was merely a nominal defendant: "It is of no consequence that the State Board of Elections played no active role in the proceedings and agreed to enforce whatever plan the district court adopted, since fees may be taxed even against entities

whose role is limited to enforcement of regulations they played no role in promulgating." *Pet. App.* 23 n. 16.

REASONS FOR DENYING THE PETITION

In its petition, the State Board raises as its principal argument a point that was little more than an afterthought in the courts below: that fees cannot be awarded against a nominal state defendant that takes no active part in the litigation. The court of appeals dedicated only one sentence in a footnote to that issue, and the district court ignored it entirely. Review of the issue raised by the petition on the scanty record of this case would hardly be prudent.

Even if the court of appeals and the district court had fully considered and discussed the issue raised by the petition, it would not warrant review by this Court. The State Board does not point to any conflict among the circuits on the issue; indeed, it acknowledges that the other redistricting decisions have uniformly awarded fees. *Pet.* 13. The State Board claims that recent attorneys' fees decisions by this Court call for a reexamination of this previously settled issue. However, none of the decisions cited by the State Board address the issue raised by the petition or cast any doubt whatsoever on the propriety of the common practice of awarding fees against nominal state defendants charged with enforcing invalid laws or regulations.

I. THE COURT OF APPEALS CORRECTLY HELD THAT ATTORNEYS' FEES MAY BE AWARDED AGAINST A NOMINAL STATE DEFENDANT.

1. The Civil Rights Attorneys' Fees Act of 1976, 42 U.S.C. § 1988, provides that "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." The Voting Rights Act includes a similar provision. 42 U.S.C. § 1973*l*(e). Although these statutes refer to the district court's discretion, this Court has repeatedly held that "the court's discretion to deny a fee award to a prevailing party is narrow." *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54, 68 (1980). Indeed, "a prevailing plaintiff should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Hensley* v. *Eckerhart*, 461 U.S. 424, 429 (1983).

The fact that the particular state entity named as the defendant may be regarded as a "nominal and neutral defendant" is not a special circumstance warranting denial of fees. As this Court held in *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 719, 739 (1980), "[f]ee awards against enforcement officials are run-of-the-mill occurrences, even though, on occasion, had a state legislature acted or reacted in a different or more timely manner, there would have been no need for a lawsuit or for an injunction." See also *Crosby* v. *Bowling*, 683 F.2d 1068, 1073 (7th Cir. 1982) ("fees can properly be taxed against those whose role is limited to enforcement of regulations that they had no role in promulgating"). The court of appeals' decision is but another of these "run-of-the-mill occurrences."

The State Board argues (*Pet.* 10-12 & n. 5) that several recent decisions of this Court should be interpreted to preclude an award of fees against a "nominal and neutral state defendant" that did not play an active role in the litigation. But none of the cases cited by the State Board address that issue and none call into question the long-settled law allowing fee awards against nominal state defendants. In *Farrar* v. *Hobby*, 113 S.Ct. 566, 575 (1992), the Court held that when a plaintiff seeks substantial compensatory damages, but "recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief," he is not entitled to attorneys' fees. That holding, of course, says nothing about this case, in which the prevailing plaintiffs received all of the relief they sought.

Kentucky v. *Graham*, 473 U.S. 159 (1985), holds that Section 1988 does not provide for a recovery of fees against a government entity when the plaintiff only sues government employees in their personal capacities. The Court emphasized that when government employees are sued in their official capacities, an award of fees is appropriate. 473 U.S. at 164-166. In this case, the State Board and its members were sued in their official capacities, so *Kentucky* v. *Graham* has no application.

Independent Federation of Flight Attendants v. *Zipes*, 491 U.S. 754 (1989), held that fees could not be awarded in a Title VII action against nongovernmental intervenors who did not violate any federal law. *Texas State Teachers Ass'n* v. *Garland Independent School District*, 489 U.S. 782, 791-792 (1989), held that a plaintiff was entitled to "prevailing party" status if it "succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties

sought in bringing suit'." *Rhodes* v. *Stewart*, 488 U.S. 1 (1988), and *Hewitt* v. *Helms*, 482 U.S. 755 (1987), both held that a plaintiff is not a prevailing party if he does not obtain any relief on the merits of his claim. *None* of these decisions have any application to this case; *none* of them decide the attorneys' fees liability of a nominal state defendant; and none of them overrule *sub silentio Supreme Court of Virginia* v. *Consumers Union* or any of the other cases holding that fees may be awarded against nominal state defendants.

2. In light of the settled law that fees can be awarded against nominal state defendants, it is not surprising that in other congressional and legislative redistricting cases – including cases decided after the decisions the State Board relies upon – courts of appeals have routinely awarded attorneys' fees to the prevailing party (*i.e.*, the party responsible for the districting map that was finally adopted by the court). See, *e.g.*, *Watkins* v. *Fordice*, 7 F.3d 453 (5th Cir. 1993); *Love* v. *Deal*, 5 F.3d 1406 (11th Cir. 1993); *Pitochelli* v. *Town of Johnston*, 996 F.2d 1209, 1993 U.S. App. LEXIS 16814 (1st Cir. 1993) (unreported decision); *In re Kansas Congressional Districts Reapportionment Cases*, 745 F.2d 610 (10th Cir. 1984); *In re Illinois Congressional Districts Reapportionment Cases*, 704 F.2d 380 (7th Cir. 1983). Indeed, we are aware of no court of appeals decision holding that an award of fees to the prevailing party in a redistricting case would be unjust, even though redistricting cases are typically brought against nominal state defendants charged with carrying out election laws.

In other contexts, the courts of appeals have agreed that fees may be awarded against nominal state defendants. For example, in *Crosby* v. *Bowling*, 683 F.2d 1068, 1073 (7th Cir. 1982), the Seventh Circuit held that "fees can properly be taxed against those whose role is limited to enforcement of regulations that they had no role in promulgating." In that case, the court of appeals upheld an award of fees against officials of the Illinois Department of Public Aid who claimed that they were merely enforcing federal regulations. The court held that the state defendants' limited authority was not a special circumstance that would make a fee award unjust. "The state defendants appear to overlook the fact that they were named parties to Crosby's suit and that relief was granted against them. * * * [T]he state defendants in the instant case were directly responsible for enforcement of the state regulations of which the plaintiffs complained." *Id.* at 1074. Other courts of appeals have also held that the fact that state or local enforcement officials were "mere functionaries" or did nothing to enforce an unconstitutional statute were not special circumstances that would make a fee award against the state unjust. See, *e.g.*, *Wilson* v. *Stocker*, 819 F.2d 943, 951 (10th Cir. 1987); *Rose* v. *Heintz*, 806 F.2d 389, 392 (2d Cir. 1986); *Coalition for Basic Human Needs* v. *King*, 691 F.2d 597, 602-603 (1st Cir. 1982); *International Oceanic Enterprises, Inc.* v. *Menton*, 614 F.2d 502, 503-504 (5th Cir. 1980).

3. The State Board's petition supplies no good reason for disturbing this uniform line of precedent. The facts of this dispute make it clear that there would be nothing inequitable or unjust about having the State pay plaintiffs' attorneys' fees and costs. The State is obligated

to enact a congressional districting plan that meets the requirements of the Constitution and federal law. The State did not fulfill that obligation. In fact, the Illinois General Assembly has not carried out its congressional redistricting obligations for 30 years.[2] The Hastert plaintiffs were therefore forced to go to court, propose their own map of congressional districts, and litigate with a host of other plaintiffs over what map was "correct". Fee awards are not intended to punish the state, but to compensate plaintiffs for the costs incurred in vindicating important federal rights. *Wilson v. Stocker*, 819 F.2d at 951; *Coalition for Basic Human Needs v. King*, 691 F.2d at 603. Because the prevailing plaintiffs went to court to obtain a valid district map, they are entitled to attorneys' fees.

The State Board is being represented by the Illinois Attorney General in this case; it does not dispute that any fee award would ultimately be paid out of the State Treasury and not out of the pockets of any of the individual defendants. The State cannot avoid its liability for

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[2] As the district court noted (777 F. Supp. at 641 & n.6), the Illinois General Assembly last enacted a Congressional redistricting plan following the 1960 census, and that plan was held to be unconstitutional. *People ex rel. Scott* v. *Kerner*, 32 Ill. 2d 539, 208 N.E.2d 561 (1965). The legislature did not adopt a new redistricting plan at that point, but instead left the task to the courts. *People ex rel. Scott* v. *Kerner*, 33 Ill. 2d 460, 211 N.E.2d 736 (1965). Following the 1970 census and again following the 1980 census, the legislature failed to adopt a redistricting plan and the courts were required to choose between competing plans. See *Skolnick* v. *State Electoral Board*, 336 F. Supp. 839 (N.D. Ill. 1971); *In re Illinois Congressional Districts Reapportionment Cases*, No. 81-C-3915 (N.D. Ill. Dec. 3, 1981), aff'd *sub nom. Ryan* v. *Otto*, 454 U.S. 1130 (1982).

attorneys' fees by hiding behind the nominal status of the State Board.

The standards developed by this Court, and further developed by the courts of appeal, have withstood the test of time and have served well the congressional intent underlying the enactment of the attorneys' fee statutes. The current standards are simple and fair to all litigants – wealthy and poor alike. Those standards properly focus on the outcome of the litigation. The State Board would have this Court examine instead the role defendants played during the litigation, and the extent to which the nominal state party named as the defendant opposed the relief sought by the plaintiffs. In light of the nature of reapportionment cases, and the myriad of interests involved, that task would be all but impossible to accomplish.

II. THE COURT OF APPEALS' APPLICATION OF THE "SPECIAL CIRCUMSTANCES" TEST DOES NOT WARRANT SUPREME COURT REVIEW.

The State Board's second argument (*Pet.* 14-15) amounts to nothing more than a claim that under the particular facts of this case, the court of appeals misapplied the "special circumstances" test. The Seventh Circuit acknowledged that fees could be denied if "special circumstances" would make an award unjust and agreed that district courts have the discretion to deny fees in appropriate cases. *Pet. App.* 22. Even if the court of appeals misapplied the "special circumstances" test to the fact of this case – and it did not misapply the test – that factual dispute would not warrant review by this Court.

In any event, the Seventh Circuit's rejection of the two "special circumstances" relied upon by the district court is clearly correct. There was no evidence in the record that the plaintiffs were wealthy and able to afford paid counsel, but even if they were this Court has made it clear that the wealth and influence of a prevailing party is not a special circumstance warranty denial of fees. *Venegas v. Mitchell*, 495 U.S. 82, 87-88 (1990); *Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989). And, as the court of appeals pointed out (*Pet. App.* 23), the fact that the state legislature could have enacted a valid redistricting plan – something it had not done since the 1950 census – is no more a special circumstance than the fact that legislative bodies could repeal other invalid laws. The State Board's assertion that the plaintiffs "shifted" the dispute to the courts restates the obvious: the parties were required to go to court to vindicate their rights and to accomplish what should have been accomplished by the General Assembly.

The Seventh Circuit properly held that the limited "special circumstances" exception did not apply in this case and that the Hastert and the Nieves plaintiffs obtained not only some, but all of the relief they sought. In these circumstances, the award of attorneys' fees was entirely proper and does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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October 1994

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No. 94-457

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ILLINOIS STATE BOARD OF ELECTIONS, et al.,
Petitioners,

v.

DENNIS J. HASTERT, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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QUESTION PRESENTED

Whether in congressional redistricting litigation involving a state defendant a plaintiff having been found to be a "prevailing party" should be denied an award of attorneys fees merely because the state defendant affirmatively chose to assume a passive role in the litigation.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

JOINT RESPONSE TO PETITION FOR WRIT OF CERTIORARI

These joint respondents, Wilfredo Nieves, Al Johnson, Linda Coronado, Bobby Rush, Jesus Garcia, Reverend Willie Barrow, Rafael Boria, Miguel Del Valle, Robert L. Lucas, Leon D. Finney, Jr., Reverend Clay Evans, Joseph Gardner, Luis V. Gutierrez, Regner Suarez, Joseph Berrios, Miguel A. Santiago and Neomi Hernandez (hereinafter *Nieves* Plaintiffs), and the Chicago Urban League, Craig R. Collins, Mark Allen and Nikolas C. Theodore (hereinafter *Urban League* Plaintiffs), respectfully pray that the Petition for Writ of Certiorari filed by the Illinois State Board of Elections to review the decision of the Seventh Circuit Court of Appeals be denied.

STATEMENT OF THE CASE

Following the release of the 1990 census data, the United States House of Representatives informed the Governor of Illinois that due to population changes reflected in the census that Illinois was entitled to only 20 representatives, as opposed to the 22 representatives serving in Congress. Under the provisions of the State's Constitution, the Illinois General Assembly was charged with the obligation of implementing a constitutionally sound congressional redistricting plan by June 30, 1991. The Illinois General Assembly failed to formulate any redistricting plan.

The Congressional Redistricting Action

Separate suits filed by the *Nieves* Plaintiffs and the *Urban League* Plaintiffs were consolidated with other lawsuits into one federal action challenging the Illinois Congressional District plan. The *Nieves* Plaintiffs and the *Urban League* Plaintiffs specifically challenged the legality of the existing reapportionment plan under the requirements imposed by the Federal Constitution and Section Two of the Voting Rights Act, 42 U.S.C. §1973. Both the *Nieves* Plaintiffs and the *Urban League* Plaintiffs sought the creation of a Hispanic majority congressional district while at the same time retaining three African-American majority congressional districts within the state of Illinois. Although the petition filed by the Illinois State Board of Elections indicated that "redistricting would have a potential impact on . . . the contours of African-American districts in proximity to the new Hispanic 'super-majority' district", this is not an accurate assessment of the congressional redistricting action. Petition at 3.

The three African-American districts existing at the time suit was filed were not threatened by the ultimate forma-

tion of a Hispanic "super-majority" district. The real threat to the three existing African-American districts was the potential for dilution of these majority districts due to the State's failure to fulfill its obligation to the citizens of Illinois by not redistricting the state. The Hispanic district created as a result of this congressional redistricting action was not by any measure the offspring of State action, but rather was born solely from the efforts of counsel for these respondents to provide the Hispanic community of Illinois with appropriate representation in the U.S. Congress. Any unbridled redistricting within the state of Illinois threatened the three African-American majority districts created in 1981, and further threatened any potential for the creation of a majority Hispanic district within the state.

Petitioner is correct in stating that the Illinois General Assembly did not redistrict Illinois before adjourning in July of 1991. In fact, the Illinois General Assembly has failed to conduct a post-census redistricting for more than a quarter of a century. The 1981 court ordered districting referred to in the petition is merely one of several examples where the citizens of this state have taken affirmative steps to redistrict where the State's General Assembly failed to formulate a plan.

During pretrial proceedings, the District Court denied the Illinois State Board of Elections and its members' (collectively referred to hereafter as the "State Board") motion to dismiss the claims against it on the grounds that the State Board "remained a necessary nominal defendant because it was obligated under the terms of the order issued in *In Re: Congressional District Reapportionment Cases*, No. 81 C 3915, Slip Op. (N.D. Ill. November 23, 1981), to conduct the forthcoming 1992 congressional elections under the 1981 congressional district plan until we (the Court) issue a superseding order." *Hastert v. State Board of Elections*, 777

F.Supp. 634, 637, 639 (N.D. Ill. 1991) (three judge panel). Additionally, the District Court panel did grant the State Board's unopposed motion that it be permitted to abide by the judgment resulting from these proceedings without providing a defense or adopting an adversarial role *Id.* Accordingly, the State Board's level of participation in this litigation was charted by the Attorney General for the State of Illinois, and not by either the Court or the various plaintiffs.

Efforts of the *Nieves* Plaintiffs and *Urban League* Plaintiffs went well beyond the "settling of differences among themselves to narrow or remove issues". Petition at page 7. These plaintiffs, and not the State of Illinois, drafted several alternatives for redistricting the state. These plaintiffs, and not the State of Illinois, crafted three majority African-American districts of such proportions which recognized the gains achieved by the African-American community in the 1981 redistricting litigation. These plaintiffs, and not the State of Illinois, crafted for the first time a majority Hispanic congressional district within Illinois.

On November 6, 1991, the District Court held that the existing congressional district plan was unconstitutional and ordered defendant State Board to implement the congressional reapportionment plan proposed by, among others, the *Nieves* and *Urban League* Plaintiffs. This reapportionment plan created a Hispanic majority congressional district and further allowed for the maintaining of three African-American majority congressional districts (although the boundaries of these districts were altered). In its opinion, the District Court ordered all parties to "bear their own costs," which in effect denied those parties who prevailed an award of attorneys fees under the applicable fee shifting statutes.

Attorneys' Fees

The *Nieves* and *Urban League* Plaintiffs, along with others, filed timely motions under Federal Rule of Civil Procedure 59(e) to amend the Court's judgment to see that of attorneys' fees were rightfully awarded. On January 17, 1992, the District Court denied the *Nieves* Plaintiff's motion on the grounds that although they were "prevailing parties" for the purposes of the fee shifting statutes, there were "special circumstances" which precluded an award of attorneys' fees. The District Court denied the *Urban League* Plaintiff's motion on the grounds that they were not a "prevailing party" for purposes of the fee shifting statute. The *Nieves* and *Urban League* Plaintiffs filed a timely appeal from the District Court's judgment.

On December 17, 1993, a panel from the United States Court of Appeals for the Seventh Circuit, with one judge descending, reversed the District Court's decision to deny attorneys' fees to the *Nieves* Plaintiffs (and others). Petitioner's Appendix at 30-53. The December 17, 1993 opinion of the Seventh Circuit failed to include the *Urban League* Plaintiffs in an award of attorneys' fees. The *Urban League* Plaintiffs filed a Petition for Rehearing.[1] On June 1, 1994, the Seventh Circuit panel, with one judge dissenting, issued an opinion granting the *Urban League*'s petition and denying the State Board's petition and further finding "that the reasons given by the District Court for denying fees to the prevailing parties in this case were inadequate." *Hastert v. Illinois State Board of Election Commissioner*, 28 F.3d 1430,

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[1] Coincidentally, the State Board's Petition for Rehearing asserting the very same arguments that it now presents in this Petition for Certiorari.

1443 (7th Cir. 1994).[2] The State Board then filed its petition for a writ of certiorari.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS' HOLDING IS CONSISTENT WITH ALL APPLICABLE DECISIONS OF THE COURTS OF APPEAL WHICH DEAL WITH THE AWARD OF FEES IN CONGRESSIONAL REAPPORTIONMENT CASES.

In this congressional reapportionment case, the Seventh Circuit held that those parties whose proposed configurations for Illinois' congressional districts were incorporated into the reapportionment plan adopted by the District Court had "prevailed" for purposes of the attorneys' fee shifting statutes, 42 U.S.C. §§1973 1(e) and 1988. *Hastert*, 28 F.3d 1440-1442. The Seventh Circuit also held that there are no "special circumstances" that would render an award of fees unjust in this case. *Id.*, at 1443-44. The Seventh Circuit's decision in this case was clearly correct and it is consistent with prior decisions where the Courts of Appeal have issued an award of attorneys' fees against the neutral state official or entity responsible for administering the election laws in favor of prevailing parties in congressional reapportionment cases. *See, eg., In Re: Kansas Congressional District's Reapportionment*, 745 F.2d 610 (10th Cir. 1984), *aff'g., O'Sullivan v. Brier*, 540 F.Supp. 1200 (D. Kan. 1982); *In Re: Illinois Congressional District's Reapportionment Cases*, 704 F.2d 380 (7th Cir. 1983); see also *Watkins v. Fordice*, 7 F.3d 453, 456 (5th Cir. 1993) (awarding fees in lawsuit to reapportion state legislative districts).

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[2] A majority of the judges in active service voted to deny the State Board's Petition for Rehearing en banc. Three dissenting judges voted to grant rehearing.

In the *In Re: Illinois Congressional District's* case, the Seventh Circuit affirmed an award of attorneys' fees against the very same State Board (although it reduced the multiplier applied by the District Court) under circumstances that are indistinguishable from those found in this case. The reapportionment litigation which followed the 1980 census and the instant litigation which followed the 1990 census share several commonalities.[3]

The State Board's suggestion that "this litigation presents the *unaddressed question* of a nominal Defendant's liability for fees when the substantive controversy is only between Plaintiff groups and 'winning Plaintiffs' are identified for their relative success against other Plaintiffs, rather than against the nominal and neutral Defendant" is misleading and inaccurate. Petition at 10-11 (emphasis added). Petitioners have failed to identify any court of appeals decision with which the decision in this case conflicts. The absence of such conflict is sufficient reason to deny the writ. *See Braxton v. United States*, ____ U.S. ____, 111 S.Ct. 1854, 1857 (1991). Granting the writ and reversing the Seventh Circuit's judgment would disrupt well settled law.

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[3] (1) The Illinois State Legislature failed to reapportion the state's congressional district's consistent with the census results; (2) the various parties filed lawsuits seeking to declare Illinois' then existing congressional district configuration unconstitutional and to substitute a court ordered congressional district plan that would comply with the applicable legal criteria; (3) Petitioner State Board conceded, prior to trial, that the existing district plan was unconstitutional; (4) the only issue at trial was which of the parties' competing plans would be chosen; and (5) the lower court held that the parties whose configurations were adopted by the court were "prevailing parties" for the purposes of the attorneys' fee statute. *In Re: Illinois Congressional Districts*, 704 F.2d at 381.

II.

THE COURT OF APPEALS' DECISION IS CONSISTENT WITH ALL APPLICABLE SUPREME COURT AUTHORITY.

Petitioner State Board also suggests that the Seventh Circuit's decision in this case is at odds with precedent from this Court. According to the State Board, none of the plaintiffs prevailed against the State Board because "the Seventh Circuit made no finding of federal law violation against the defendant, and a litigation resolved only the disputes existing between plaintiffs." Petition, at 12. "Where a Defendant has not been prevailed against, federal fee shifting statutes do not authorize an award against that defendant." Petition, at 11-12 (citing *Farrar v. Hobby*, ___ U.S. ___, 113 S.Ct. 566, 572 (1992); *Kentucky v. Graham*, 473 U.S. 159, 165 (1985). Petitioner erroneously contends that none of the plaintiffs prevailed against the State Board and thereafter illogicly concludes that the Seventh Circuit errored in the awarding of attorney fees. The State Board's argument is without merit for several reasons. First, there was a violation of federal law for which the State Board should be held accountable. The District Court found that "the Illinois General Assembly failed to undertake its constitutional obligation to devise a new congressional district scheme for the state." *Hastert*, 777 F.Supp. at 637. The District Court further held that "the present congressional district plan is both unconstitutional and impractible due to population and demographic changes represented in the 1990 census." *Id.* It was the state legislature's failure to perform its duty which caused a violation of the United States Constitution. The *Nieves* and *Urban League* plaintiffs clearly prevailed in accomplishing the difficult task of redistricting Illinois, an obligation the State failed to meet.

Sadly, this dereliction of duty was merely the latest chapter in the State of Illinois' consistent history of failing to de-

velop valid congressional reapportionment plans. As the District Court noted:

> "Illinois last formally enacted a congressional redistricting plan in 1961. . . . That apportionment was ruled unconstitutional in *People Ex Rel. Scott v. Kerner*, 32 Ill. 2d 539, 208 N.E. 2d 561 (1965). Despite ample time to devise a constitutional redistricting plan for the 1966 congressional elections, the general assembly avoided the task, leaving the judiciary with a task of adopting one among various provisional plans. . . . In the 25 years since *Kerner*, the Illinois legislature failed to enact a congressional redistricting plan on two separate occasions. As a result, this issue was defaulted to the judiciary (in 1971 and 1981)."

Hastert, 777 F.Supp. at 641 n. 6. *See also Golegrave v. Green*, 328 U.S. 549 (1946) (recognizing the legislatures' failure from 1901 to 1945 to redraw Illinois congressional districts to reflect population changes). This Court has made it absolutely clear that a fee award can be taxed against the State Board, as an enforcer of election laws, despite the fact that it was the State's legislature whose inaction prompted the Plaintiffs' successful lawsuit. *See Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 739 (1980). In *Consumers Union*, this court held that:

> "Fee awards against enforcement officials are run-of-the-mill occurrences, even though on occasion, had a state legislature acted or reacted in a different or more timely manner, there would have been no need for a lawsuit or for an injunction." *Id.*

Lower courts have taken this admonition to heart. *See, eg., Hastert*, 28 F.3d at 1444 n. 16 ("fees may be taxed even against entities whose role is limited to enforcement of regulations they played no role in promulgating"); *Crosby v. Bowling*, 683 F.2d 1068, 1073 (7th Cir. 1982); *O'Sullivan v. Brier*, 540 F.Supp. 1200, 1207 (D. Kan. 1982), *aff'd and re-*

manded, on other grounds; *In Re: Kansas Congressional District's Reapportionment Cases*, 745 F.2d 610 (10th Cir. 1984); *Connor v. Winter*, 519 F.Supp. 1337, 1343-44 (S.D. Miss. 1981). Thus, the State Board, "as an agency of the state", may properly be held accountable for the prevailing partys' attorneys' fees.

Second, contrary to the State Board's contentions, the *Nieves* and *Urban League* Plaintiffs were ultimately found to be prevailing parties by the court. Any other conclusion would be unwarranted. The *Nieves* and *Urban League* Plaintiffs fully achieved their objectives when the court determined that the State's existing congressional districts were unconstitutional and ordered the implementation of the reapportionment plan incorporating the *Nieves* and *Urban League* configuration for the State's Hispanic and African-American majority congressional districts. Contrary to the State's assertion, the *Nieves* and *Urban League* Plaintiffs were not litigating a political dispute, but were fighting to protect the voting rights of the Hispanic and African-American communities of Illinois.

III.

THE IMPOSITION OF AN AWARD OF ATTORNEYS' FEES IN THIS CASE DOES NOT CREATE ANY SPECIAL AND IMPORTANT REASONS WHICH WARRANT THIS COURT'S INTERVENTION.

Assuming arguendo that the State Board played a nominal role in this litigation, that alone does not constitute special circumstances to warrant denial of fees to the *Nieves* and *Urban League* plaintiffs.

In its petition, the State Board contends that "the imposition of fees in this matter challenges theoretical and very practical aspects of fee shifting statutes." Petition at 13. The State Board then expressed concern regarding (1) how

the reasonableness of the claimed attorneys' fees will be determined, (2) how the State Board will be able to identify non-compensable hours when it "holds no historical knowledge of the litigation," and (3) the supposed incentive to litigation that will be created because the Plaintiffs may prevail between themselves, without being exposed to an opponent's fees, and still seek attorneys' fees from the State Board. *Id.* In truth, none of the State Board's concerns implicate the theoretical or practical aspects of the fee shifting statutes. Nor do any of their false concerns create any special and important reasons which warrant this court's intervention under Supreme Court Rule 10.1.

With respect to the determination of compensable hours, the District Court will be guided by long-standing Supreme Court precedent. As this Court has held:

> "The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate . . . This figure, commonly referred to as the 'lodestar,' is presumed to be the reasonable fee contemplated by §1988."[4]

City of Riverside v. Rivera, 477 U.S. 561, 568 (1986), *quoting Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983); *see also City of Dague v. Burlington*, 112 S.Ct. 2638, 2641 (1992). When determining whether an attorney's time has been reasonably expended in the course of litigation "the relevant issue . . . is not whether hindsight vindicates an attorney's time expenditures, but whether at the time the work was performed, a reasonable attorney would have engaged in similar time expenditures." *Grant v. Martinez*, 973 F.2d 96, 99 (2d Cir. 1992), *cert. denied*, 113 S.Ct. 978

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[4] Both §1988 and §1973 1(e), statutes under which respondents seek attorneys' fees, are construed similarly. *See, eg., Hensley v. Eckerhart*, 461 U.S. 424, 433 n. 7 (1983).

(1993). These principles are fully applicable to this case and it makes no difference that the State took affirmative steps to not participate in the underlying litigation.

The State Board's second concern, its supposed inability to identify non-compensable hours, cannot be taken seriously. The State Board's purported lack of "historical knowledge of the litigation" was created by its own doing. The State Board was not barred from participating in this litigation; on the contrary, the State Board decided not to participate. *Hastert*, 777 F.Supp. at 639.[5] Second, even though it did not participate in the litigation, the State Board will be free to examine the prevailing parties' fee petitions and supporting materials and to make appropriate objections. Additionally, the District Court (which is fully familiar with the litigation) will ultimately determine the amount of fees awarded to Plaintiffs.

Lastly, the State Board's concern that an award of fees in this case will provide an incentive to litigation because Plaintiffs may litigate against themselves, with no risk, and the State Board will pay the winner's fees is completely misplaced. The sole reason that this litigation occurred is because the Illinois General Assembly failed to fulfill its constitutional duty to reapportion Illinois' congressional districts. The State's dereliction of duty compelled the Plaintiffs to bring a lawsuit in order for the requirements of the Federal Constitution and of Section Two of the Voting Rights Act, 42 U.S.C. §1973 to be satisfied. There is

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[5] Given that the Seventh Circuit had affirmed an award of attorneys' fees in the 1981 congressional reapportionment litigation, and that the existing congressional reapportionment plan under which the State Board was bound by court order to implement was indisputably unconstitutional, it was probable, if not inevitable, from the onset of this litigation that there would be an award of attorneys' fees.

nothing inappropriate in the Plaintiffs having sought relief from the Federal District Court when the State legislature failed to perform its constitutional duty. *See, eg., Wise v. Lipscomb*, 437 U.S. 535, 540 (1978).[6]

CONCLUSION

There is no dispute that the *Nieves* and *Urban League* Plaintiffs have been found to be prevailing parties. This fact is irrefuted. The Seventh Circuit, in determining that the *Nieves* and *Urban League* Plaintiffs were prevailing parties for the purpose of the fee shifting statutes, followed well settled caselaw from this Court and other lower Courts by directing the District Court to award fees in this voting rights litigation.[7] The State Board's Petition has failed to establish that the Seventh Circuit's decision is in conflict with any precedent from this Court or any of the Courts of Appeal. Additionally, the State Board has failed to show that this run-of-the-mill voting rights litigation created any special and important reasons which warrant this Court's

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[6] Moreover, the State Board's contention that the plaintiffs face no risk when initiating this litigation is without factual support. No group of plaintiffs was guaranteed an award of attorneys' fees when they filed their respective lawsuits. Only prevailing parties are entitled to receive an award of attorneys' fees and, in fact, those plaintiffs who did not prevail had to absorb their own attorneys' fees and other litigation costs. This risk is inherently born by any Plaintiff that files suit.

[7] Prior to the District Court's opinion, which was reversed by the Seventh Circuit, no other court had denied attorneys' fees to a prevailing voting rights plaintiff under circumstances similar to this case.

intervention. Based upon the foregoing, the State Board's Petition for Certiorari should be denied.

Respectfully submitted,

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